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IN THE

Supreme Court of the United States

October Term, A. D. 1955

No. 262

WESTBROOK PEGLER, THE HEARST CORPORATION and HEARST CONSOLIDATED PUBLICATIONS, INC.,

Petitioners,

v.

QUENTIN REYNOLDS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WESTBROOK PEGLER, THE HEARST CORPORATION and HEARST CONSOLIDATED PUBLICATIONS, INC.,

Petitioners,

against

QUENTIN REYNOLDS,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show:

Opinions Below

The opinion of the Court of Appeals, Second Circuit (*infra*, p. A-1) is reported at 222 F. 2d ——. The opinion of the District Court (Applt. appx. 191) is reported at 123 F. Supp. 36.

Jurisdiction

The judgment to be reviewed is dated and was entered June 7, 1955. 28 U. S. C. Section 1254 is believed to be jurisdictional basis for review of said judgment by writ of certiorari.

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Questions for Review

1.—In civil jury diversity cases arising under state common law do the English and the state common law determine what issues must be submitted to the jury or may the federal court transfer to the court an historical jury function?

2.—In civil jury diversity cases arising under state common law is there a denial of the constitutional guarantee of a jury trial and a reexamination of a fact tried by a jury, other than by the common law, when the Court undertakes the decision of a question of fact which historically was reserved at common law for the jury?

3.—Must a federal court in civil jury diversity cases based on state common law vindicate the state law that in cases of wilful tort there may not be an award of exemplary or punitive damages if the jury has found specifically that there were no damages suffered for which compensation could be awarded?

4.—In civil jury diversity cases based on state common law claims is it within the power and part of the function of the Court of Appeals and of the trial judge to determine whether the amount of exemplary damages fixed by the jury exceeds the limits set by the law of the state or must federal appellate and district court inquiry stop with review of the semantic propriety of the standards posed by the trial judge to the jury?

Constitutional Provision Involved

The Seventh Amendment to the Constitution of the United States of America, Senate Document No. 170, p. 891 (1952), reads as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

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by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statement of the Case

This is a New York common law civil jury suit for damages, for a libel, in a column written by defendant Westbrook Pegler, distributed by the defendant Hearst Corporation and published on November 29, 1949, by defendant Hearst Consolidated Publications, Inc., the owner of the New York Journal-American, a New York City newspaper.

Federal jurisdiction rests upon diversity of citizenship and as stated by the Court of Appeals, "the substantive aspect of the case is governed by New York law" (*infra,* p. A-2).

The plaintiff, Quentin Reynolds, on November 20, 1949, launched a provocative defamatory public attack in the public press against Pegler. The medium employed was a book review of Dale Kramer's "The Heywood Broun His Friends Recall" which plaintiff wrote for the New York Herald Tribune Book Review. The prompt reply or retort by Pegler to this assault was transported to court by Reynolds as the libel complaint herein. Pegler counterclaimed for the defamation contained in the originating attack by Reynolds.

The counterclaim was not resolved as the jury disagreed.

The jury's verdict on the complaint was in favor of the plaintiff Reynolds. The jury found utter absence of any compensatory damage to Reynolds and under instructions from the judge expressed this as an award of $1.00 payable by the three defendants. However, the jury then proceeded to assess fines totaling $175,000 as punitive damages, allo-

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cated $100,000 against Pegler, $50,000 against The Hearst Corporation and $25,000 against Hearst Consolidated Publications, Inc.

The plaintiff accepted as correct the verdict that he had suffered no actual damage of any kind and neither moved to set it aside nor appealed therefrom.

By launching a public attack in the public press, Reynolds, according to New York and common law, created a privileged occasion—Pegler was thereby vested with legal privilege to publicly defend and reply to the attack without peril. This is akin to the privilege of self-defense and counter-thrust to physical attack. The defendants all pleaded in their answers among other defenses that the occasion was one of qualified privilege to reply. And under the circumstances the individual defendant was privileged to put his side of the controversy before the public, and in so doing to attack and even libel the plaintiff with immunity, unless on submission of the defense of privilege to the jury it should find that the plaintiff had proved malice in fact in the exercise of the privilege.

1.—The District Judge held that the plaintiff by his provocative conduct had created the occasion for a privileged reply to the attack. However, the Judge assigned to himself the function to weigh the character of the reply, and ruled that defendants had in portions of the reply "exceeded" or abused their privilege. The Judge thereupon deprived the defendants of their privilege and dismissed the defense of reply just before the case was given to the jury. In consequence there was a complete shift in the applicable rules given to the jury for decision of the issues of fact (burden of proof; presumptions; requirement of actual and not merely constructive malice; absence of unfavorable inferences from unproved plea of truth in the answer; etc.). The ruling of the Judge was thus basic.

The Court of Appeals affirmed the exercise of function by the District Judge on the issue whether to deprive

defendants of their privilege to reply but expressed as its rationale therefor that portions of the privileged reply were not relevant or pertinent to the initial attack and consequently that the right to jury determination of the defense of privilege had been forfeited.

2.—The jury found that plaintiff had suffered no damages for which compensation could be or were awarded—the verdict was in the nominal sum of One Dollar. Defendants insist that under New York law there can be no award to plaintiff of punitive damages.

The District Judge, relying on lower state court decisions ruled that punitive damages may be awarded even in the absence of compensable injury. This ruling is squarely in conflict with the law as announced by the highest state court, the New York Court of Appeals.

The Second Circuit refused to examine this question on appeal. It did not advert in its opinion to any New York authority whatsoever. The court below was content to rely on its dictum in *Stevenson* v. *Hearst Consol. Publications, Inc.*, 214 F. 2d 902, 911 (2 Cir. 1954), cert. den. 348 U. S. 874 (1954), which, we shall show, was an actual damage case, and moreover the cases decided by the New York Court of Appeals in which compensatory damage is absent were neither argued nor considered in *Stevenson*.

3.—The Court of Appeals further held that "even if we thought the verdict excessive" it had neither the function nor power, nor did the trial judge, to do more than to observe whether the legal standards had been told to the jury. The Court gave no consideration to whether the verdict exceeded the limits set by the state law or by the common sense of trained judicial minds.

ARGUMENT

I.

Key questions relating to the respective functions of judge and jury in a civil jury case based on diversity were disposed of in the courts below in disregard of the common law in 1791, in disregard of the pre-*Erie* v. *Tompkins** applicable decisions of the Supreme Court and in disregard of New York state law which adopts the English common law. In so deciding, the courts below violated the constitutional guarantee of jury trial due to the defendants.

Under universally accepted common law and state law principles, when, in a libel suit, the defense of qualified privilege is interposed, the functions of judge and jury are allocated as follows:

1. The judge determines whether there is an occasion of privilege.

2. The jury determines whether the claimed libel is within the privilege or in excess of what the occasion requires—(i.e.) the non-existence or existence of malice in fact.

The Court of Appeals departed abruptly from the above accepted and usual course of judicial proceedings and sanctioned an equally abrupt departure therefrom by the District Court.

The Court of Appeals avowedly applied in this case "a better view" of federal law which permitted the judge to take away from the jury the determination of whether the claimed libel was in excess of what the occasion required; and, further, the Court of Appeals assumed for itself the jury function of determining whether the claimed libel was within the privilege.

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* *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938).

The exercise of this Court's power of supervision is thus urgently required.

The substantive common law and New York law of libel as conceded by the lower courts is that:

> "Where the plaintiff begins a controversy the defendant is privileged to reply."[1]

The question *in limine* for a trial judge to decide is whether the plaintiff began the controversy and thereby created an occasion for a privilege to reply. The courts below found such an occasion was created here. When Reynolds launched the controversy he conferred on Pegler, as matter of law, the privilege to reply, without peril, and obviously such reply may be libel else no need exists to invoke the defense of privilege.[2]

Having determined *in limine* that an initial attack had been made by Reynolds on Pegler, the function of the trial judge with respect to the defense of privilege was at an end—it then became a jury question to settle whether the defendants had fairly and properly conducted themselves in the exercise of their privilege to reply.

> "The legal character of the occasion is determined by the ruling of the court, the use of the occasion by the finding of the jury."[3]

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[1] Seelman, *The Law of Libel and Slander in the State of New York* (1941), par. 255, p. 249; *Hibbs* v. *Wilkinson*, 1 F. & F. 608, 610, 175 Eng. Rep. 873 (C. P., 1859).

[2] *Seelman, op. cit. supra*, par. 255; *Dickson* v. *The Earl of Wilton*, 1 F. & F. 419 at p. 426, 175 Eng. Rep. 790 (C. P. 1859). The corporate defendants as publishers are entitled to the author's protection of the defense of privilege. *Cassidy* v. *Brooklyn Daily Eagle*, 138 N. Y. 239 (1893); *Preston* v. *Hobbs*, 161 App. Div. (N. Y.) 363 (1st Dept. 1914) *Israel* v. *Portland News Pub. Co.*, 152 Ore. 225 (1936).

[3] *Brice* v. *Curtis*, 38 App. D. C. 304, 307 (D. C. Cir. 1912).

This was the common law of England as it existed in 1791 and therafter;[4] this common law was embraced in the interstices of federal jurisprudence by the Seventh Amendment to the United States Constitution;[5] this English common law was followed and applied pre-*Erie* in a qualified privilege libel case by this Court.[6] The English common law and the pre-*Erie rule* followed by this Court, represent the New York state law in qualified privilege libel cases.[7]

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[4] *Dickson* v. *The Earl of Wilton*, 1 F. & F. 419, 426-7, 175 Eng. Rep. 790 (C. P. 1859); *Rogers* v. *Clifton*, 3 B. & P. 587, 592, 127 Eng. Rep. 317 (C. P. 1803), and cases cited especially at p. 594 decided by Lord Mansfield; *Fairman* v. *Ives*, 5 B. & A. 642, 106 Eng. Rep. 1325 (K. B. D., 1822); *Delany* v. *Jones*, 4 Esp. 191, 170 Eng. Rep. 687 (K. B. C. P., 1803); 20 Halsbury's *Laws of England* (2d ed.) 499-506; *Adam* v. *Ward*, [1917] A. C. 309; *Koenig* v. *Ritchie*, 3 F. & F. 413, 176 Eng. Rep. 185 (C. Q. B. 1862); *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524, 529; *Boxsius* v. *Goblet Freres* [1894] 1 Q. B. 842; *Huntley* v. *Ward*, 6 C. B. (N. S.) 514, 141 Eng. Rep. 557 (C. P. 1859); *Colvin* v. *McKay*, 17 Ont. R. 212, 219 (Can. 1889). The English writers are in accord. See Gatley, *Libel & Slander*, pp. 231, *et seq.* (4th ed. 1953); *Bower, A Code of Laws of Actionable Defamation*, pp. 119, *et seq.* (6th ed. 1929); *Odgers, Libel & Slander*, pp. 240 et seq. (6th ed. 1929).

[5] *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899); *Hodges* v. *Easton*, 106 U. S. 408 (1882); *Gillen* v. *Phoenix Indemnity Co.*, 198 F. 2d 147 (5 Cir. 1952); *United States* v. *Wonson*, 28 Fed. Cas. No. 16750, at 745-50 (C. C. D. Mass. 1812); cf. *Wilkerson* v. *McCarthy*, 336 U. S. 53 at pp. 55, 62 (1949).

[6] *White* v. *Nicholls, et al.*, 44 U. S. 266, 290-2 (1845) citing and relying upon English common law authorities at p. 292.

[7] *Fowler* v. *New York Herald Tribune*, 184 App. Div. (N. Y.) 608 (1st Dept. 1918); *Preston* v. *Hobbs*, 161 App. Div. (N. Y.) 363, at pp. 364-5 (1st Dept. 1914); *Collier* v. *Postum Cereal Co.*, 150 App. Div. (N. Y.) 169, at pp. 178-9 (1st Dept. 1912); *Mencher* v. *Chesley*, 193 Misc. 829 (Sp. T. Kings 1948); *Lubliner* v. *Reinlib*, 62 N. Y. S. 2d 212 (Sp. T. N. Y. 1946); and see opinion of Judge Danforth in *Hinman* v. *Hare* at p. 259 at 1 *Silvernail* 241 (N. Y. Ct. App. Rep. 1887), 104 N. Y. 641 (1887); to the same effect *Lally* v. *Emery*, 59 Hun (N. Y.) 237 (4th Dept. 1891).

No court, other than the courts below, has heretofore examined, as matter of law, the use made of the occasion to reply under qualified privilege.

Pertinency, the test of use of the occasion applied in the court below, is not the concern of a court—it is for the jury—in cases of qualified privilege as at bar. The pertinency test concerns a court only in cases of *absolute* privilege, e. g., where the libel appears in a pleading or legal paper. In *absolute* privilege cases it is the function of the court to dismiss the claim if the words are pertinent, even if there be malice in fact. Lack of pertinency destroys *absolute* privilege and renders the privilege *qualified* only, and then it is for the jury to settle the question of malice in fact.[8]

The English common law of function of judge and jury in qualified privilege cases was summarized by Lord Campbell, C. J., in *Dickson* v. *The Earl of Wilton*, 1 F. & F. 419, 426-7, 175 Eng. Rep. 790 (C. P. 1859):

> " 'A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable.'
>
> Whether or not the occasion gives that privilege is a question of law for the Judge; but whether the party has fairly and properly conducted himself in the exercise of it is a question for the jury. I, therefore, as the Judge, tell you that, in point of law, all the communications to Lord Combermere, to the War Office and to Mr. Duncombe were privileged;

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[8] *Sickles* v. *Kling*, 60 App. Div. (N. Y.) 515, 516-17, 520 (2d Dept. 1901); Seelman, *The Law of Libel and Slander in the State of New York*, par. 609, p. 505 (1941).

but whether that privilege has been abused is for the jury. If it has been abused, the privilege is gone; but if the communications were made *bona fide*, and in the discharge of duty merely, they are privileged.

* * * But if he abused that privilege, and from any motive other than a sense of duty, or from what the law calls 'malice,' made a charge, and said what could not be justified in point of truth, and his object was to prevent Mr. Duncombe from bringing those proceedings before the House of Commons, and so preventing justice from being done, then the privilege is gone. It lies on the party who would deprive the other party of his privilege to show what the law calls 'malice.' But by that term is meant, not only spite, for any indirect motive, other than a sense of duty, is what the law calls 'malice.' You will say whether the defendant acted from a sense of duty, and *bona fide*, or from a feeling of irritation, and whether, acting at the suggestions of others, he went beyond the law.

Mr. James has stated several circumstances which he considered had taken away the defendant's privilege; but, until the contrary is shown, it must be presumed that a party acted *bona fide*."

The reason given at common law why the question of excess of privilege—which means malice in fact—was invariably a question for the jury, was that a qualified privileged occasion raised the rebuttable presumption of absence of malice and it was incumbent on the plaintiff to show bad faith or malice in fact.[9]

In short, whenever the plaintiff introduced evidence of malice in fact in a qualified privilege case, there was a conflict in the evidence for the jury to resolve.

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[9] *Wright* v. *Woodgate*, 2 Cr. M. & R. 573, at 577-8, 150 Eng. Rep. 244 (Ex. 1835); *Jenoure* v. *Delmege* [1891] A. C. 73, at p. 79.

Jury issues under English common law in 1791 continue to be so triable today; they have not been transmuted into questions of law for the trial judge in 1955.

Pre-*Erie, in White* v. *Nicholls et al.*, 44 U. S. 266 (1845) this Court in a qualified privilege case set the functions of judge and jury as urged by petitioners herein and contrary to the rules applied below:

> "But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the *plaintiff* would have been bound to establish in relation to it. *The jury, and the jury alone,* were to determine whether this malice did or did not mark the publication" (p. 292). (Emphasis supplied.)

In a solid line of authority, New York courts hold that it is a jury question whether a privileged reply has exceeded the privilege or abused the privilege or embodies irrelevancy by reason of bad faith. This means that the use of the occasion is to be tested by the finding of the jury. It is for the jury to say whether excess or irrelevancy proceeded from some motive other than from a sense of duty to defend himself against plaintiff's attack.

A leading New York text writer on libel law expresses the state law as follows:[10]

> "It is said that the defense of privilege can only be settled by a jury. But whether the occasion is privileged is only for the jury if the facts upon which the claim rests are in dispute; *or when the facts are exceeded.*" (Emphasis supplied.)

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[10] Seelman, *op. cit. supra,* par. 609, p. 505.

This quotation expresses the state law regardless of the nature of the occasion which gives rise to the qualified privilege.[11]

In *Fowler* v. *New York Herald Tribune,* a qualified privilege of reply case (ft. 7) the New York court expressed the function of judge and jury as follows (p. 611):

> "Whether the defendant in its publication went beyond its legal privilege and should be charged with malice is a question of fact for the jury, both in determining defendant's liability and also in determining the amount of punitive damages which should be awarded in case liability were found."

The New York court in the *Fowler* case further held that the protection of the privilege is not forfeited even if the reply contains "a revelation or explanation of the infirmities or peculiarities of the plaintiff. The defendant had a qualified privilege so to do" (p. 611).

Mencher v. *Chesley* (ft. 7) is the latest New York case on this subject. There the New York court pertinently held (p. 831 of 193 Misc.):

> "the question whether the defendant went beyond his privilege is one of fact for the jury to determine, and that it cannot be disposed of as a matter of law."

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[11] *Loewinthan* v. *Beth David Hospital,* 290 N. Y. 188 (1943); *Campbell* v. *New York Evening Post,* 245 N. Y. 320 (1927); *Pecue* v. *West,* 233 N. Y. 316 (1922); *Andrews* v. *Gardiner,* 224 N. Y. 440 (1918); *Ashcroft* v. *Hammond,* 197 N. Y. 488 (1910); *Klinck* v. *Colby,* 46 N. Y. 427 (1871); *O'Connor* v. *Field,* 266 App. Div. (N. Y.) 121 (1st Dept. 1943); *May* v. *Syracuse Newspapers, Inc.,* 250 App. Div. (N. Y.) 155 (3rd Dept. 1937); *Morton* v. *Knipe,* 128 App. Div. (N. Y.) 94 (2nd Dept. 1908); *Payne* v. *Rouss,* 46 App. Div. (N. Y.) 315 (2nd Dept. 1899).

In *Hinman* v. *Hare* (ft. 7), the only case in which the New York Court of Appeals has discussed the question of excess of reply, the minority opinion—without dissent from the majority (see p. 245), the court having split on evidentiary rulings—said (p. 259):

> "Both aspects (privilege of reply and privilege to comment on subordinates to superiors) are presented by the answer. But the defendant would nevertheless be liable if the untrue statements were *in excess* of what the occasion required, *or* if there were any *want of good faith* in making the communication, or in its publication; and those questions were *exclusively for the jury.*" (Emphasis supplied.)

The lower courts in this case correctly assumed or conceded that the article was in fact a reply to the initial attack and the internal evidence in the article alone established this fact.

By actual count twelve paragraphs of the column are referred to in the third paragraph of the opinion of the Court of Appeals as a reply to the Reynolds' charge of "moral homicide" (*infra,* pp. A-2-3). That portion of the column which the Court of Appeals concedes was in fact a reply covers approximately seven folios in the appellants' printed appendix below (pp. 4-7) while that portion which the Court of Appeals asserts was not relevant covers approximately seven and one-half folios of the same printed appendix (pp. 7-9). In short, by the very standards of relevancy or pertinency applied by the Court of Appeals, approximately half of the column in question was directly relevant and pertinent to the initial attack.

Under common law, as we have demonstrated, the trial judge could not overthrow the privilege and dismiss the defense of reply asserted under the instant circumstances.

Only malice in fact could overthrow the privilege and that was a jury's function to determine.[12]

The dismissal of the defense of reply operated to shift the legal presumption of *bona fides* of defendants in the use of their privilege which existed in jury trials at common law, to a presumption of malice of defendants. The burden of proof in libel cases lay with the plaintiff, at common law, to overcome the presumption of *bona fides* which accompanies a reply on a privileged occasion by proof of malice in fact. Excessiveness, irrelevancy, impertinency, intemperateness—none of these render the privilege unavailable as matter of law; such proof goes only to the factual question for the jury as to whether the presumption of *bona fides* in favor of the defendants has been rebutted by proof on the part of the plaintiff of malice in fact.[13]

The court below expressed the doubt extant in the lower federal courts as to the impact of *Erie* v. *Tompkins* on the respective functions of a federal judge and jury in civil jury common law diversity cases (*infra,* p. A-7). Such doubts should be resolved by this Court.

A large number of diversity jury cases decided in the lower federal courts since *Erie* v. *Tompkins* demonstrate

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[12] Cf. *Adam* v. *Ward* [1917] A. C. 309, opin. of Lord Atkinson at p. 339; see also opin. of Lord Shaw at p. 350.

[13] *Jenoure* v. *Delmege, supra* (ft. 9); *Wright* v. *Woodgate, supra* (ft. 9); *Fairman* v. *Ives, supra* (ft. 4).

an existing confusion as to the legal basis on which the functions of federal judge and jury are to be allocated.[14] Some cases ground the decision of the question on state law; some, as at bar, on a notion of what the federal rule should be; and some on the historical common law distribution of the functions in existence in 1791.

This confusion should be corrected by this Court.

The court below read New York law as permitting the judge, as matter of law, to settle whether the privileged occasion has been properly used and to decide whether the privilege has been forfeited because of the character of portions of the privileged reply. This, we say, is not New York law. But, even if it were, the federal courts would be bound to vindicate the historical common law right to a jury test of the question since a state cannot do away

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[14] *Pierce Consulting Eng. Co.* v. *City of Burlington,* 221 F. 2d 607 (2 Cir. 1955), applying state law; *Gutierrez* v. *Public Service Interstate Transp. Co.,* 168 F. 2d 678 (2 Cir. 1948), applying state law; *Prudential Insurance Co.* v. *Glasgow,* 208 F. 2d 908 (2 Cir. 1953), applying state law; *Ross* v. *Service Lines, Inc.* (E. D. Ill.) 31 F. Supp. 871, applying state law; *Beagle* v. *Northern Pacific Ry. Co.* (W. D. Wash. 1940) 32 F. Supp. 17, applying state law; *Zauderer* v. *Continental Casualty Co.,* 140 F. 2d 211 (2 Cir. 1944), implying that notions of federal law control; *State of Washington* v. *United States,* 214 F. 2d 33 (9 Cir. 1954), applying notions of federal law; *Ettelson* v. *Metropolitan Life Ins. Co.,* 137 F. 2d 62 (3 Cir. 1943), cert. den. 320 U. S. 778 (1943), applying notions of federal law—the court succinctly pointed out that "The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since" at p. 66; *Diederich* v. *American News Co.,* 128 F. 2d 144 (10 Cir. 1942) (correctly applying English common law as it existed in 1791, as the applicable federal law); *Gillen* v. *Phoenix Indemnity Co.,* 198 F. 2d 147 (5 Cir. 1952) (correctly applying English common law as it existed in 1791, as the applicable federal law; and see 5 *Moore's Federal Practice* (Second ed. 1951) pp. 86-102.

with the right to a jury trial in a federal court of a question of fact as that existed in 1791 at common law.[15]

The courts below have thus, to use the words of Lord Alvanley in *Rogers* v. *Clifton*, 3 B. & P. 587, at p. 592, 127 Eng. Rep. 317 (C. P. 1803) "grievously invaded the province of a jury."

In sum, on this aspect, we here have a case of:

1.—A direct conflict between the lower courts and the Supreme Court on federal questions which concern the application of historical common law in the federal courts in civil jury diversity cases and the construction of the federal Constitution and the rights thereunder;

2.—A broad confusion of legal doctrine, *viz.*, the impact of *Erie* v. *Tompkins* on the applicability of historical common law to the functions of federal judge and jury;

3.—A failure to vindicate state law in a diversity case;

4.—A novel question of recurring and wide national importance not previously decided by this Court since *Erie* v. *Tompkins* and a decision below in conflict with an applicable pre-*Erie* decision of this Court.

II.

The state law was not vindicated on a) the substantive issue whether a fine by way of punitive damages may be levied against a party where there is a finding that no compensable injury has been caused, or b) on the substantive issue whether punitive damages may be assessed on one who has been privileged by law to reply to an initial attack by the other.

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[15] *Herron* v. *Southern Pacific Co.*, 283 U. S. 91 (1931); *Hodges* v. *Easton*, 106 U. S. 408 (1882); *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899); *Gillen* v. *Phoenix Indemnity Co.*, 198 F. 2d 147 (5 Cir. 1952). Cf. *Wilkerson* v. *McCarthy*, 336 U. S. 53 at pp. 55, 62 (1949).

The court below strikingly failed to refer to any *holding* whatever—federal or state—in reviewing these issues—although the legal points have been adjudicated.

On the first of these substantive issues the court below merely cited its recent dictum in *Stevenson* v. *Hearst Consolidated Publications, Inc.*,[16] to sustain the punitive damages at bar.

Stevenson is inapplicable dictum because actual damage of $25,000 was there found to exist to which the jury added punitive damages of $50,000 and the issue disposed of on appeal was the propriety of the relationship of those two figures. Moreover, in *Stevenson* the attention of the Court of Appeals was not drawn to nor did it consider the law as laid down by the New York Court of Appeals for cases where, as here, compensable injury is absent.

The second of these substantive issues was entirely overlooked and not answered below at all.

First: At bar there was a specific finding of no compensable injury—the verdict was in the nominal amount of $1.00 against all three defendants. A nominal verdict means, as matter of law, that actual injury was absent.[17] There was a further verdict below, that of punitive damages of $175,000.

The law of New York as applied by its court of last resort, the New York Court of Appeals, flatly denies the right in all wilful tort cases, which includes libel cases, to punitive damages unless there are actual compensable injuries.[18]

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[16] 214 F. 2d 902 (2 Cir. 1954) cert. den. 348 U. S. 874 (1954).

[17] *Manhattan S. Institution* v. *Gottfried Baking Co.*, 286 N. Y. 398 (1941); *Colt* v. *Owens*, 90 N. Y. 368 (1882).

[18] *Kiff* v. *Youmans*, 86 N. Y. 324 (1881); *Gressman* v. *Morning Journal Association*, 197 N. Y. 474 (1910); *Voltz* v. *Blackmar*, 164 N. Y. 440, 444 (1876); cf. *Robison* v. *Rupert*, 23 Pa. 523 (1854). See note collecting authorities for the New York rule, 33 A. L. R. 373 at pp. 385-6 (1924).

In *Kiff*, the New York Court of Appeals held:

> "When given they (punitive damages) are superadded, as the learned trial Judge in the cases before us stated, to the former (compensation for injury). It would seem to follow, therefore, that he who by reason of his fault cannot have the first (compensation) must be destitute of any legal right to the other. They (punitive damages) cannot stand in its place; *nor can they be added to what does not exist*" (p. 331, emphasis supplied).

Second: The state law further commands that a plaintiff who has provoked the libel in the retort complained of, one who has by initial attack brought on the breach of public order, is not entitled to exemplary damages.[19]

One who excites public disorder by initial attack may not "profit by punishment imposed on his adversary for the protection of the community." "If satisfaction is to be made for the breach of public order, it is not due to him, for his own wrong is the consideration upon which it stands, and for that he cannot be allowed to profit" (*Kiff* v. *Youmans*, p. 331).

These salutary principles apply and are New York law in all cases of alleged wilful tort whether they be libel, assault, false imprisonment or other.[20]

There is then to be corrected by action of this Court not merely a dispute on state law but a basic failure to vindicate or apply indisputable and undisputed state principles of substantive law applicable to a diversity case. This Court has not heretofore decided the issue whether the doctrine of *Erie* v. *Tompkins* mandates that state law of punitive damages must be applied in a diversity case in the federal court.

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[19] *Kiff* v. *Youmans*, *ibid.* at pp. 330-32; *Gressman* v. *Morning Journal Association*, *ibid.* pp. 480-1.

[20] *Voltz* v. *Blackmar*, *ibid.* at p. 444.

III.

Under *Erie* v. *Tompkins*, the substantive law of New York was deemed controlling here. This embraces the substantive law that punitive damages may be levied when appropriate in a libel case.

However when it came to considering and applying New York limits on punitive amounts which a court may countenance, the lower courts disavowed the power to do so. They placed a stop or limitation on their power at the point of determining whether a semantically correct charge was given to the jury. There is no such stop or limitation in state law.

Under *Erie* the federal court in diversity cases has power and is bound to test the punitive damage verdict to determine whether the amount fixed by the jury exceeds state limits as construed and determined by state courts. The question which a federal court is empowered to and should review according to the Third Circuit is (*mutatis mutandis*):

> "Did the amount fixed by the jury exceed the limits, albeit not clearly defined, set by the law of Pennsylvania." [21]

There is thus a conflict on the notion of judicial power of the federal court between the Second with the Third and Ninth Circuits (and perhaps others)[22] as to the powers and function of the reviewing court, which ought to be reresolved by this Court.

To adopt a New York rule under *Erie*, and then to cast out the New York construction, application and intendment of the rule by proclaiming a judicial helplessness to consider the judicial limitations on the rule makes little sense. The construction, limitation and intendment of the New

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[21] *Biggans* v. *Hajoca Corp.*, 94 F. Supp. 593, at 601 (D. C. Pa. 1950), affd. 185 F. 2d 982 (3 Cir. 1950). To the same effect; *Covey Gas & Oil Co.* v. *Checketts*, 187 F. 2d 561 (9 Cir. 1951).

[22] See ft. 25, *infra*.

York substantive law on punitive damages are as much substance and right as the formulation of the rule.[23]

The New York limits, albeit not clearly defined, show a context of restrained disciplinary fines and abhorrence of jury monstrosities and careful supervision, limitation and revision thereof by the Court. Immoderate verdicts are always to be tested by trained judicial minds, once by the trial judge and again on appeal.[24]

Jury-shopping and competition between state and federal courts on this vital matter is intolerable and has no sanction in federal law and should not thrive on a notion that federal courts have no adequate power to impose what may be regarded as substantive limits on a jury verdict, in a diversity case.[25]

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers by writ of certiorari to the United States Court of Appeals, Second Circuit.

Dated: July 22, 1955.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioners.

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[23] Cf. *Gillen* v. *Phoenix Indem. Co.*, 198 F. 2d 147, 152 (5 Cir. 1952).

[24] *McCormick on Damages*, p. 278.

[25] *Affolder* v. *N. Y. C. and St. L. R. Co.*, 339 U. S. 96, 101 (1950); *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 482 (1933); *Pettingill* v. *Fuller*, 107 F. 2d 933, at 936 (2 Cir. 1939); *Virginia Ry. Co.* v. *Armentrout*, 166 F. 2d 400 (4 Cir. 1948) (Parker, Cir. J.); *Bucher* v. *Krause*, 200 F. 2d 576 (7 Cir. 1953) (Lindley, Cir. J.); *Sunray Oil Corp.* v. *Allbritton*, 187 F. 2d 475 (1951), on rehear. 188 F. 2d 751 (5 Cir. 1951); *Southern Pac. Co.* v. *Guthrie*, 180 F. 2d 295 (9 Cir. 1949), on rehear. 186 F. 2d 926 (9 Cir. 1951); *Cobb* v. *Lepisto*, 6 F. 2d 128 (9 Cir. 1925); *Trowbridge* v. *Abrasive Co., etc.*, 190 F. 2d 825, 830 (3 Cir. 1951).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 193—October Term, 1954

Argued February 16 and 17, 1955

Decided June 7, 1955

Docket No. 23329

QUENTIN REYNOLDS,

Plaintiff-Appellee,

against

WESTBROOK PEGLER, THE HEARST CORPORATION and HEARST CONSOLIDATED PUBLICATIONS, INC.,

Defendants-Appellants.

Before FRANK and MEDINA, Circuit Judges, and BRENNAN, District Judge.

Defendants appeal from a judgment in favor of plaintiff in a libel action in the United States District Court for the Southern District of New York, tried to court and jury. Edward Weinfeld, Judge. Opinion below reported at 123 F. Supp. 36. Affirmed.

PHILLIPS, NIZER, BENJAMIN & KRIM, New York City, New York (LOUIS NIZER, WALTER S. BECK, PAUL MARTINSON and SEYMOUR SHAINSWIT, New York City, New York, of Counsel), for plaintiff-appellee.

MCCAULEY & HENRY, New York City, New York (MILTON POLLACK, New York City, New York, of Counsel), for defendants-appellants.

MEDINA, Circuit Judge:

This is a libel action based upon a column of defendant Westbrook Pegler, published on November 29, 1949, by defendant Hearst Consolidated Publications, Inc., owner of the New York Journal-American, a New York City newspaper, which had purchased the article from defendant Hearst Corporation, whose King Features Syndicate division had syndicated the article not only to the Journal-American but to a large number of other publications throughout the United States. As federal jurisdiction is based upon diversity of citizenship, the substantive aspect of the case is governed by New York law. The result of the trial to court and jury was a verdict against all defendants in the sum of one dollar as compensatory damages and, in addition, punitive damages against Pegler in the sum of $100,000, against Hearst Corporation in the sum of $50,000, and against Hearst Consolidated Publications, Inc. in the sum of $25,000, or smart money of $175,000 in all.

On this appeal defendants claim that the column, or at least the greater part of it, was not defamatory, that no award of punitive damages was warranted, especially against the corporate defendants, that the trial judge ruled as matter of law on certain issues which should have been submitted to the jury, and that defendants did not have a fair trial by reason of a variety of allegedly erroneous rulings said to have been prejudicial to defendants.

The controversy revolves about a book review of Dale Kramer's "The Heywood Broun His Friends Recall," which plaintiff wrote for the New York Herald Tribune Book Review of November 20, 1949, some ten years after Broun's death, and the Pegler column "On Heywood Broun and Quentin Reynolds," published in the November 29, 1949 issue of the Journal-American, above referred to. By counterclaim it was alleged that the book review itself was

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defamatory of Pegler, and this question was not resolved, as the jury disagreed. In any event, defendants claim that, whether or not based upon excerpts from Kramer's book or upon the book as a whole, the effect of what plaintiff wrote was to assert that Pegler had called Broun a liar, that Broun brooded over this allegedly false charge, and that, although suffering from a cold at the time, Broun couldn't sleep or relax and that he died. This is interpreted as a charge of "moral homicide." The Pegler column is supposed to be a reply to this charge. And the first few paragraphs, with well salted digressions, bear some resemblance to a reply, as they state that "Broun was a notorious liar," that he was "a dirty fighter" and "made his living at controversy," and it is broadly suggested that any notion that Broun sank into despondency and finally died because of anything written about him by Pegler was scarcely credible. There were a few shafts in plaintiff's direction also in these opening paragraphs. The Pegler column then continues: "Reynolds gives some false impressions. So I offer some corrective data."

What follows is a scathing denunciation of plaintiff, which the trial judge held had no conceivable relevancy to any part of plaintiff's review of Kramer's book. Many of the statements concerning plaintiff are plainly defamatory *per se* and the column read as a whole undoubtedly held plaintiff up to "public hatred, contempt, scorn, obloquy or shame." *Triggs* v. *Sun Printing and Publishing Association*, 179 N. Y. 144 (1904). Thus it is asserted in "As Pegler Sees It," the column in suit "that Reynolds and his girl friend of the moment were nuding along the public road," that the neighbors might not understand, and if "they saw Reynolds and his wench strolling along together, absolutely raw, they would call the State police;" that "as Reynolds was riding to Heywood's grave with her, he proposed marriage" to the widow; that Reynolds

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"became one of the great individual profiteers of the war" and "cleaned up $2000 of the ill-gotten loot of the Garsson brothers who, with Congressman Andy May, later were convicted of fraud in war contracts"; that he was a "four-flusher," with "an artificial reputation as a brave war correspondent in the London blitz," one of the " 'let's you and him fight' school of heroes" and that Clare Boothe had "peeled him of his mangy hide and nailed it to the barn door with the yellow streak glaring for the world to see"; and more to the same effect.

Various and sundry explanations are furnished by defendants to support their contention that these charges are innocuous and susceptible of innocent and harmless interpretations, but these explanations are wholly without merit or substance. For example it is suggested that "[P]erfectly honorable people are nudists," and that "[A]t common law, nudism was not a crime." The ride to the grave may have been "years after the date of Broun's death," and the Mosaic Code is cited as imposing "upon a brother the duty of proposing to his dead brother's widow;" and so on.

Defendants' counsel in his brief referred to the part about the "yellow streak" as "political gloating in jesting terms," and it may well be that many readers of the column were highly amused by what they read. But this is a curious and unprofitable sort of jesting, as others may not view the humor in the same light. After all, it is elementary that the alleged defamatory article must be read as a whole.

The trial judge presided with his usual meticulous attention to detail, examining with scrupulous care the authorities cited in support of the many questions of law pressed upon his attention by defendants' experienced counsel. The part of the charge relative to the defamatory character of the column, including the statement, "[T]hat column read in its entirety, I charge you as matter of law,

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is defamatory," was read to the lawyers for the respective parties in chambers and counsel for defendants agreed that it was unexceptionable.

The refusal of the trial judge to charge as requested with reference to paragraphs 12 and 20 of the Pegler column is assigned as prejudicial error. These paragraphs included the statement that plaintiff's "medicine grew too strong even for Collier's" and "a fellow of his politics can do fairly well in Hollywood," also the statement that plaintiff "cleaned up $2000 of the ill-gotten loot of the Garsson brothers." But the innuendoes pleaded in the complaint did not so far exceed the scope of any reasonable interpretation of the language used in the alleged libel as to justify a ruling as matter of law that the innuendoes were unwarranted. The document must be read as a whole, as has already been noted; and the interpretations given in the innuendoes are neither strained nor unnatural. The trial judge properly instructed the jury that if it failed to find that the meanings suggested by plaintiff were conveyed by the words used, then in that event the paragraphs were "out of the case," but, if the language used was found fairly to import and to be understood by the public as having the meanings claimed by plaintiff, the jury should proceed to determine whether or not these paragraphs were defamatory in accordance with the rules given in the general instructions on that subject. These rulings were in accord with well settled New York law. See *Sullivan* v. *Daily Mirror Inc.*, 232 App. Div. 507 (1st Dept. 1931); *Mattice* v. *Wilcox*, 147 N. Y. 624, 638 (1895); *Morrison* v. *Smith*, 177 N. Y. 366, 369 (1904).

Defendants argue that the judgment must be reversed because the trial judge ruled, as matter of law, that Pegler's article of November 29, 1949 "exceeded the limits of the qualified privilege of reply." The claim is made that, under New York law, this issue is one which must neces-

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sarily be submitted to the jury. But defendants evidently misconceive the nature of this defense and fail to distinguish the separate functions of judge and jury in the trial of cases in which the qualified privilege of reply is sought to be invoked as a defense.

By way of background it is well to bear in mind that the defense under consideration is one of "qualified" privilege. Thus, even when applicable, it affords no protection to defendants, unless it is found as a fact that the alleged defamatory matter was published in good faith. Accordingly, where the alleged libel is justified by way of defense as a reply to a prior attack upon the defendant by the plaintiff, the New York cases, assuming them to be applicable, place upon the trial judge the duty to determine *in limine,* as matter of law, whether the content of the alleged libel is pertinent or relevant to the matter contained in the purported initial attack [*Guenther* v. *Ridgway,* 187 App. Div. 593, (1st Dept., 1919); *Mencher* v. *Chesley,* 193 Misc. 829 (Sup. Ct. Kings 1948); *Lubliner* v. *Reinlib,* 62 N. Y. S. 2d 212 (Sup. Ct. N. Y. County 1946); *Lovell* v. *Houghton,* 116 N. Y. 520 (1889)] and, in this connection, the New York courts have held that the requirement is satisfied if the alleged libel is addressed to the plaintiff's motive in taking the initiative [*Collier* v. *Postum Cereal Co. Ltd.,* 150 App. Div. 169 (1st Dept. 1912)]. If pertinency is absent, the defense of privilege is unavailable and there is no need for further inquiry. If, however, the court is satisfied that the content of the alleged libel is related to the subject matter of the plaintiff's claimed attack or to the plaintiff's motive in making the attack, the case is an appropriate one for the invocation of the privilege of reply, and the remaining question is whether the defendant's reply was made in bad faith, in which event the defense fails. It is the function of the jury to pass upon the question of whether or not defendant published the alleged defamatory matter in good faith, as this is a subject on

which reasonable men may differ. [*Ashcroft* v. *Hammond*, 197 N. Y. 488 (1910); *Fowler* v. *New York Herald Tribune*, 184 App. Div. 608 (1st Dept. 1918)]. The authorities relied upon by defendants in support of their contention are either wholly inapposite or are cases in which the respective courts concluded or assumed that the defendants' utterances were pertinent to the antecedent attack or to plaintiff's motive in making it and where it was held that it was the function of the jury to pass upon defendant's good faith, lack of malice and honest belief that the statements made concerning plaintiff were true.

In this case, it is apparent that Judge Weinfeld concluded that the content of Pegler's article was in no way related to the matter contained in Reynolds' book review or to Reynolds' motive in writing it, but was, rather, a wholly separate personal attack upon Reynolds, inspired perhaps by resentment engendered by the references made to Pegler in the book review. We have examined both writings and are persuaded that this conclusion was justified. Consequently, there was no error in dismissing the alleged defense of privilege.

But it is far from clear that decisions relating to the functions of court and jury in diversity cases are governed by state law. See *Pierce Consulting Engineering Co., et al.* v. *City of Burlington*, —— F. 2d —— (C. A. 2, 1955) decided April 4, 1955. The impact of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) on this question is still in doubt. Prior to that case, it was clear that federal law controlled [*Herron* v. *Southern Pacific Co.*, 283 U. S. 91 (1931)] and the better view would seem to be that no change was wrought by the *Erie* decision. See *State of Washington* v. *United States*, 214 F. 2d 33, 40 (C. A. 9, 1954); *Ettelson, et al.* v. *Metropolitan Life Ins. Co.*, 137 F. 2d 62, 64-65 (C. C. A. 3, 1943) certiorari denied 320 U. S. 777 (1943); *Diederich* v. *American News Co.*, 128 F. 2d 144 (C. C. A. 10, 1942); 5 Moore, Federal Practice (2nd Ed.) 95-104.

Applying federal law, we are of the view that the content of Pegler's column is so patently unrelated to the subject matter of the book review as to compel the conclusion that the trial judge would have been remiss in his duty had he submitted this issue to the jury.

On the subject of the assessment of punitive damages defendants make a number of points which will be considered *seriatim*.

As the finding of compensatory damages was in the nominal sum of one dollar, defendants insist that under New York law there can be no award of punitive damages. But we have already held otherwise in *Stevenson* v. *Hearst Consol. Publications, Inc.*, 214 F. 2d 902, 911 (C. A. 2, 1954). Moreover, in the absence of some indication of passion or prejudice, the amount of punitive damages to be awarded is an issue peculiarly within the province of the jury to decide. It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment and in order to deter them from repeating the offense, but only to review the rulings by the trial judge, which are said to constitute reversible error. As he applied the proper standards in passing upon the motion to set aside the verdict and for a new trial, we cannot find any abuse of discretion, and we should be required to reach the same conclusion, even if we thought the verdict excessive. See *Stevenson* v. *Hearst Consol. Publications, Inc., supra.*

The claim that the evidence was insufficient to warrant the assessment of punitive damages has little to support it. As to defendant Pegler, the substantial and varied proofs of malice and ill-will are such as to make it quite unnecessary to collate them, except in so far as they may be included in the matters which will now be discussed, in connection with the contention that there was no basis for an assessment of punitive damages against the two corporate defendants.

The mere fact that there was no proof of personal ill-will or animosity on the part of any of the corporate executives toward plaintiff does not preclude an award of punitive damages. Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights.

There is always a certain risk involved in the pleading of truth as a defense, since in proper cases and under proper instructions the jury may infer malice from the fact that a defendant repeats the defamatory matter, which is later found to be false. But here answers were served on behalf of each defendant, which not only repeated but elaborated upon the matters set forth in the original defamatory publication; even the tone and characteristics of the pleading are reminiscent of the style of the column in suit, although the answer is said to have been composed by one or more of the lawyers. It will not do to beg off on the plea that there is no proof that any of the corporate officers read this pleading before it was filed in court and that it is unverified and bears only the subscription of counsel. Despite all this, the fact remains that those who composed this answer and caused it to be filed were acting within the scope of their authority and what they did is binding upon defendants.

Because of the wide scope of the alleged defamatory column, and the vigor with which counsel for the respective parties very properly probed into a seemingly endless number of particular incidents which had more or less relevance

to the many issues raised by the pleadings, the trial judge was faced with a formidable task of administration of the trial. This duty was performed with commendable patience and thoroughness, and many of the miscellaneous points now urged upon us as ground for reversal of the judgment involved no more than the exercise of judicial discretion so that the trial, which consumed over seven weeks, should not be unduly protracted and the minds of the jurors be kept free from the burden of a mass of confusing testimonial and documentary evidence of conjectural materiality and little probative value.

It was particularly important that so much of the evidence as related to the subject of communism, communist sympathizers and so-called leftist organizations be kept within reasonable bounds. After all it is apparent that this was not by any means the major issue in the case; and a mere reading of the column itself and the openings and summations of counsel make this clear beyond cavil. Accordingly, we see no occasion to do more than mention by the way that there was no undue restriction upon the cross-examination of plaintiff on this issue, nor was it prejudicial or in any way improper for the trial judge to interrogate Pegler in chambers for the purpose of making informed and correct rulings on certain disputed matters of evidence.

The exclusion of certain letters written by one Thomas E. Harney purporting to link plaintiff with subversive organizations was proper in view of their hearsay character, their lack of probative value in relation to the issues before the court and the prejudicial nature of their contents.

The testimony of Bella V. Dodd appears to have been offered primarily for the purpose of establishing plaintiff's reputation among communists and communist sympathizers. Defendants now assert that it was also their in-

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tention to offer this testimony to prove the subversive nature of certain organizations with which, they claim, the plaintiff was associated in some way. But there was no proof that the witness was qualified to testify on the subject of plaintiff's reputation and the rulings were in every way proper. See *Michelson* v. *United States,* 335 U. S. 469 (1948). Moreover, the trial judge indicated his readiness, at all times, to receive competent evidence of plaintiff's reputation.

The effort to adduce from this witness statements relative to the nature of certain organizations suffers from the same infirmities as the Harney letters and the trial judge was justified, in the exercise of his discretion, in excluding matter of such doubtful evidentiary value in order to avoid the confusion, delay and prejudice which would, in all probability, have attended its admission. See *Utah State Fair Bureau Federation, et al.* v. *National Farmers Union Service Corp., et al.,* 198 F. 2d 20, 24-5 (C. A. 10, 1952); *United States* v. *88 Cases, More or Less Etc.,* 187 F. 2d 967, 974-975 (C. A. 3, 1951).

We have carefully examined the other contentions of defendants, some of which were not presented by objection or exception at the trial, and we find no merit in any one of them.

Affirmed.

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 262

WESTBROOK PEGLER, THE HEARST CORPORATION and HEARST CONSOLIDATED PUBLICATIONS, INC.,

Petitioners,

against

QUENTIN REYNOLDS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners' Spurious "Questions for Review"

In an effort to elicit the interest of this Court, petitioners (p. 2) have conjured up four "questions for review," which are all academic and premised upon distortions of the opinions below. It will be shown that no matter how these questions should be answered, the judgment would be affirmed.

Thus, it is entirely immaterial how petitioners' first question be answered, since "the English law," "the state common law" and the "federal" law of libel all concur in upholding the power of the court to dismiss the defense of privilege of reply, where the alleged "reply" clearly exceeds the privilege. The second question also rests upon a false premise, since at "common law" and "historically" (Pet., p. 2), the scope and pertinence of an alleged reply were not for the jury at all; the "Seventh Amendment to

the Constitution" (*ibid.*) has no relevancy hereto. When there is added the fact that the identical issue actually *was* submitted to the jury, and decided unequivocally against the petitioners (Point II, *infra*), these questions are relegated to the realm of fantasy.

Petitioners' Question 3 is nonexistent, since the court below expressly did follow "the state law." Question 4 is similarly hypothetical and falsely premised, since both the trial judge and the Court of Appeals, far from limiting themselves to a "review of the semantic propriety" of the charge (*ibid.*), affirmatively tested the verdict under New York substantive law.

Corrected Statement of the Facts

The petition studiously avoids any description of the libelous column. That column is as scurrilous and vicious as any published by a large metropolitan newspaper and, particularly, one syndicated throughout the nation to more than 12,000,000 readers (Appendix to Appellants' Brief below, fol. 601). The mere reading of the column (*id.*, fols. 12-27) suffices to demolish petitioners' basic, and virtually sole, contention of privilege of "reply."

The article to which petitioners allegedly replied was a book review by plaintiff of Dale Kramer's biography, "Heywood Broun" (Pet., p. 3). That article was a fair and accurate résumé of the book, which petitioner Pegler admittedly did not even trouble himself to read before he launched his attack (Trial Minutes, pp. 2808-10). Like the book, the review ended with a description of Broun's death and the surrounding circumstances (Trial Minutes, pp. 1146, 1172 *et seq.*, 1220 *et seq.*). Indeed, the review was much kinder to Pegler than the book (*e. g.*, Appendix to Appellee's Brief below, fols. 85-9).

Petitioners, far from "replying" to this book review, published a personal attack upon the plaintiff of unprece-

dented virulence. Their column, of which the opinions below quote "a sampling of but a few of the maledictions" (Appellants' Appendix below, fols. 592-3; 123 F. Supp. 36, 40; Pet., pp. A-3-4), vilified plaintiff in every aspect of his professional career, his politics, his integrity and personal courage, and his most intimate habits and morals. The sixteen or more invectives hurled against plaintiff range from one that "Reynolds and his girl friend of the moment were nuding along the public road * * * absolutely raw," to the statement that he had had "his mangy hide (peeled) and nailed * * * to the barn door with the yellow streak glaring for the world to see" (Applts.' Appendix, fols. 20, 26).

The gross falsity of all of defendants' calumnies was proven, not only by the twenty-six witnesses for plaintiff but, in large measure, by Pegler's own admissions that he, as well as his co petitioners, actually possessed information that his charges were false (Trial Minutes, *e. g.*, p. 3862 *et seq.*). In further complete refutation of petitioners' contention that their column was a "reply" to the book review, the evidence showed that the defendants, almost two years before that book review, had published another column about plaintiff, bristling with personal malice (Appellees' Appendix, fols. 19-21).

POINT I

The "conflicts" and "novel questions" alleged in the petition are spurious. The New York, English and Federal Law all concur in holding that it is for the court, not for the jury, to determine whether a publication exceeds the scope of a privileged reply.

The court below held that the portions of the libel column which related to plaintiff were "a wholly separate attack upon Reynolds," and "a scathing denunciation of plaintiff which * * * had no conceivable relevancy to the review of Kramer's book" (Pet., pp. A-7, A-3).[1]

Both in the trial and the appellate courts, petitioners assumed that the New York law applied, and argued the question on that basis. The appellate court, in affirming, also pointed out—so as to preclude any possible contention of error—that under the federal law as well, "the trial judge would have been remiss in his duty had he submitted this issue to the jury" (Pet., p. A-8). Consequently, the Court of Appeals fortified the ruling of the District Court by indicating that, far from creating any "conflict"—which is the entire premise of this petition (pp. 6, 16)—the authorities of all jurisdictions fully concur therewith.

The New York decisions unequivocally uphold the dismissal of the defense.

The opinion below (p. A-2) cited five of the many New York decisions in support of the trial court's action.[2] In

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[1] Petitioners (p. 13) fail to mention that "the first few paragraphs," which the court below held "bear some resemblance to a reply" (p. A-3), relate almost entirely to Broun. The court continued: "What follows is a scathing denunciation of plaintiff * * *" (*ibid.*).

[2] Among the other New York decisions to the same effect, not cited in the opinion below, are: *Hamilton* v. *Eno*, 81 N. Y. 116 (1880); *Sickles* v. *Kling*, 60 App. Div. 515 (1901) (cited by petitioners, p. 9); *Zirn* v. *Bradley*, 268 App. Div. 1063 (1945), and *Bingham* v. *Gaynor*, 203 N. Y. 27 (1911), both arising on demurrers to the defense of privilege; *Beardsley* v. *Maynard*, 4 Wend. 336, affd. 7 Wend. 560 (1831); see also the decisions cited in 26 A. L. R. 830, at 833, 844.

the leading case of *Guenther* v. *Ridgway,* 187 App. Div. 593 (1st Dept., 1919), which was cited by both courts below but is ignored by petitioners, the publication in suit also purported to be a reply to charges made by plaintiff against defendants, and it was far more pertinent than the Pegler column. The Appellate Division held, as a matter of law, that the defendant in that publication:

> "did not attempt to defend himself from the charges made against him, but made a counter-attack in which libelous charges were made against the plaintiff not pertinent to the matters charged in the attack. Where this is done the replying party has exceeded his privilege and it affords him no protection. * * * the privilege having been exceeded, there was no question upon this issue to be left to the jury." (p. 596)

The court below held that petitioners "evidently misconceive the nature of this defense and fail to distinguish the separate functions of judge and jury in the trial of cases in which the qualified privilege of reply is sought to be invoked as a defense" (Pet., p. A-6). It clearly drew the distinction, which petitioners here persist in misconceiving; viz., between (1) the question whether "the content of the alleged libel is related to the subject matter of the plaintiff's claimed attack," which is for the court, and (2) "whether the defendants' reply was made in bad faith" (malice), which is ordinarily for the jury (*ibid.*). The first question, intrinsically, is one of the construction of a writing, which is peculiarly for the court.

Petitioners' authorities are not only distinguishable, but are also completely adverse to them. Seelman, "*The Law of Libel and Slander in the State of New York,*" from which petitioners quote out of context (p. 11), clearly states (§ 268, p. 263):

> "If the words uttered or published on an occasion, otherwise privileged, are manifestly irrelevant, the court should as a matter of law declare them unprivileged * * *."

In petitioners' cited *Payne* v. *Rouss* (Pet., p. 12). the Appellate Division held, directly contrary to petitioners:

> "The court may determine whether the subject-matter to which the alleged libel relates, the interest in it of the defendant, or his relations to it, are such as to furnish the excuse" (p. 317).

Similarly, in *May* v. *Syracuse Newspapers* (*ibid.*), it was cogently held: "It was for the court to determine as matter of law" whether a publication was privileged (p. 158). In *Campbell* v. *New York Evening Post,* 245 N. Y. 320 (1927; Pet., *ibid.*), the decision was for the plaintiff, on the very ground that "the privilege thus extended must be kept strictly within proper bounds" (p. 329). *Lubliner* v. *Reinlib,* 62 N. Y. S. 2d 212, 213 (1946; Pet., p. 8, and cited in the opinion below, p. A-6), holds that the privilege of reply is untenable where the publication is:

> "a counterattack unrelated to the charge * * * and beyond the bounds of defense or reply."

The *Fowler, Mencher, Collier,* and *Ashcroft decisions* (Pet., pp. 8, 12), are shown by the opinion below also to favor respondents (Pet., pp. A-6–7.) [3]

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[3] In *Fowler* (Pet., p. 12), as the same court pointed out in its later decision in *Guenther* v. *Ridgway, supra,* at 596, "the alleged libel was concededly a reply to the previous attack." From their quotation from *Mencher,* 193 Misc. 829, petitioners (p. 12) omit the beginning of the very sentence quoted, namely: "It seems that the reply made by the defendant was relevant to the issues made by plaintiff" (p. 832). In *Hinman* (Pet., p. 13), where the majority opinion is concededly inapplicable, petitioners have torn out of context from the minority opinion a mere *obiter,* and even the minority recognized that the question of pertinence of allegedly privileged matter is for the court, citing *Hamilton* v. *Eno* (*supra,* p. 5) (10 N. E. at 51-2—no official report). All of the other New York decisions cited (Pet., ftns. 7-11) reiterate the very distinction drawn by the court below (*supra,* pp. 5-6) between lack of pertinence and malice.

Furthermore, this Court has frequently held that it will not review the construction given to state law by the Court of Appeals of the circuit containing that state, unless that construction is so patently erroneous that no "reasonable arguments can be made" in support thereof (*Spiegel's Estate* v. *Commissioner*, 335 U. S. 701, 708 [1949]; *Helvering* v. *Stuart*, 317 U. S. 154, 163 [1942]). Obviously, petitioners fail to meet this test.

The federal decisions are in complete accord.

Petitioners scarcely dispute the propriety of the dismissal of the defense of qualified privilege of reply under federal law. The cases are many and clear.

Russell v. *Washington Post Co.*, 31 App. D. C. 277 (C. A., D. C., 1908) decided that it was actually reversible error for the trial court to submit to the jury the defense of qualified privilege, where it was apparent that the privilege had been exceeded. The court held:

> "The article here complained of is not privileged, and * * * there is, therefore, no question of privilege to be submitted to the jury" (p. 286).

Strikingly pertinent to the language of the instant column is *Raymond* v. *United States*, 25 App. D. C. 555 (1905), cert. den. 200 U. S. 619 (1906):

> "But this pretense of privilege is absurd. The scurrilous character of the communication is such as should have precluded it from being addressed to anyone. Scurrility and privilege cannot go together" (p. 559).

Other cases to the same effect are legion.[4]

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[4] *Merchants' Ins. Co.* v. *Buckner*, 98 Fed. 222, 232-3 (C. A. 6, 1899); *Corrigan* v. *Macloon*, 22 F. 2d 520, 522 (C. A. 9, 1927); *Washington Times Co.* v. *Bonner*, 86 F. 2d 836, 840 (C. A., D. C., 1936); *Norfolk & Washington Steamboat* v. *Davis*, 12 App. D. C. 306, 327 (C. A., D. C., 1898); *Blake* v. *Trainer*, 148 F. 2d 10, 12 (C. A., D. C., 1945); *Shyrock* v. *S. P. Calkins & Co.*, 248 Fed. 649, 654 (C. A. 4, 1918).

Petitioners' two authorities are, again, wholly inapplicable.[5]

The English common law, which petitioners invoke, is also completely adverse to them.

In support of their spurious constitutional argument, petitioners purport to rely upon the "common law of England as it existed in 1791 and thereafter" (pp. 7-8). That law, however, fully supports the trial court's dismissal of the defense and, as petitioners concede (p. 8), it is basically the same as the New York law, above discussed.

The leading English treatise, *Gatley on Libel and Slander* (4th ed., 1953), cited by petitioners themselves (p. 8), states:

> "In answering an attack a man must not make countercharges or unnecessary imputations on the private life of the person who has attacked him wholly unconnected with the attack and irrelevant to his vindication" [citing numerous English cases, as well as the New York decision of *Guenther* v. *Ridgway, supra*] (p. 271).
>
> "* * * 'The judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion'" (p. 279).[6]

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[5] In *Brice* (Pet., p. 7), the alleged slander consisted merely of a diagnosis of a physician "made in the natural course of his business" (p. 309), and was concededly relevant to the occasion. Indeed, this case was decided by the same court which decided *Russell, Raymond* and, later, *Washington Times* and *Blake,* all hereinabove (pp. 7-8) shown affirmatively to support the decision below. *White* (Pet., p. 11) held merely that a privilege is defeated by malice, which may be evidenced by the content of the publication itself. The citation of that case in *Merchants' Ins. Co.* (*supra,* ftn. 4), at 231, further establishes that it is entirely consonant with the decision below.

[6] To the same effect, see Odgers, *A Digest On The Law of Libel and Slander* (6th ed., 1929), (Pet., p. 8), pp. 239, 241-2, 249-50.

The English decisions fully support Gatley's summary. For example, in *Senior* v. *Medland* (1858) 4 Jur. (N. S.) 1039, the court held, as matter of law, that an alleged reply so transcended the charge to which it was directed as to exceed the privilege. In the words of Baron Watson, "The question of privilege is entirely for the judge" (p. 1040).[7]

Petitioners' English citations are, again, adverse to them. Thus, in *Huntley* v. *Ward* (Pet., p. 8), the defense of qualified privilege in the writing of a letter was actually dismissed, as matter of law, on the ground that "the letter, however, is not confined to the history of the supposed ground of action, but contains general and gross abuse of the plaintiff, and imputations upon his character" (6 C. B. [N. S.] at 518).

20 *Halsbury's Laws of England* (Pet., *ibid.*) 469, upholds precisely the distinction made below: "The ques-

[7] To the same effect are: *Ahern* v. *Maguire* (1840) Arm. Mac. & Ogle. 39—"Confidential [privileged] or not confidential, is a question for me, not for the jury. If a man is asked about one business, is he to travel into others not at all relevant to the subject in hand, and ask them to be considered privileged?" (p. 43); *Fryer* v. *Kinnersley* (1863) 15 C. B. C. (N. S.) 422, 431, 143 Eng. Rep. 849, 853—"The calling the plaintiff 'a raving madman', and some other expressions, are so much in excess of the occasion as to prevent our holding [the libel] to fall within the rule as to privileged communications"; *Pearce* v. *Symes* (1909) 28 N. Z. L. R. 562, 563-4; *Godson, Gent* v. *Howe* (1819) 1 Brod. & B. 7, 8, 129 Eng. Rep. 625, 626; *Tuson* v. *Evans* (1840) 12 Ad. & E. 733, 736, 113 Eng. Rep. 991, 993; *Warren* v. *Warren* (1834) 1 C. M. & R. 250, 252, 149 Eng. Rep. 1073, 1074; *Rhodes University College* v. *Field* (1947) 3 S. A. L. R. 437, 467; *Milne* v. *Walker* (1893) 21 R. 155, 157, Ct. of Sess.; *McQuire* v. *Western Morning News Company, Ltd.* (1903) 2 K. B. 100, 112; *McKeough* v. *Moran* (1927) Ir. R. 348, 358-9; 18 *Am. & Eng. Encyc. of Law* (2nd ed., 1901) 1033 and cases there cited; Newell, *The Law of Libel and Slander* (2nd ed., 1898) 519, 522, "Digest of English Cases" therein; also *Brewer* v. *Chase*, 121 Mich. 526, 537 (1899), which, collating English and American authorities, held: "It does not follow that an irrelevant charge must be submitted to a jury to determine whether it is excessive for such cannot be privileged under any circumstances."

tion whether the privilege has been exceeded is also one for the judge to determine, but the question whether the privilege is destroyed by malice is for the jury * * *." *Adam* v. *Ward* (*ibid.*) held: "The judge has to * * * rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion * * *" (p. 321).

In all but two of the petitioners' other authorities, no question of reply was involved at all (e. g., *Dickson* v. *The Earl of Wilton,* Pet., pp. 7-10, where, as petitioners' own quotation discloses, the "abuse of privilege" referred to meant merely "malice").[8] In the other two (*Koenig* and *Colvin, id.* at 8), no issue of the pertinence or scope of the reply was even raised.

The postulated question of the application of *Erie R. R. Co.* v. *Tompkins* is entirely academic.

As hereinabove (p. 4) indicated, the reference by the court below to federal law (Pet., pp. A-7-8), upon which petitioners (p. 14) have seized as a pretext for certiorari, serves actually to buttress the trial court's ruling. The question—if there be a question—of the effect of *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), on the choice of law is entirely academic since, as hereinabove demonstrated, the dismissal of the defense was proper, and even mandatory under New York, federal and English law. As shown in the following Point, which demonstrates on additional grounds the utter mootness of petitioners' contention, this Court will not review a question which is academic or abstract.

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[8] Furthermore, that case was overruled by a higher court in *Dawkins* v. *Lord Rokeby* (1873) 28 L. T. 134, 141, affd. H. L.; *Hennesey* v. *Wright* (1888) 59 L. T. 323, 329.

Petitioners' citation of the Seventh Amendment is also frivolous.

In the first place, the dismissal of the defense could not have constituted a deprivation of petitioners' constitutional "right of trial by jury"—as petitioners here, for the first time, suggest (pp. 2-3, 6, 8, 15-16)—for the simple reason that the question, as hereinabove demonstrated, was always, under English as well as American law, within the exclusive province of the court. The question is one merely of general law, which petitioners' label "does not convert into one involving the construction and application of the Constitution."[9]

As was held in petitioners' own cited *Diederich* v. *American News Co.*, 128 F. 2d 144, 146 (1942; Pet., p. 15):

> "The power of the judge to pass upon questions of law is just as much an essential part of the process of trial by jury at common law guaranteed by the Seventh Amendment, as is the power of the jury to pass upon questions of fact."[10]

Similarly, in *Herron* v. *Southern Pacific Co.*, 283 U. S. 91 (1931, Hughes, C. J.), cited in the opinion below (Pet., p. A-7), this Court unanimously upheld the ruling of the trial judge dismissing the defense of contributory negligence as a matter of law, despite an express provision in the state constitution that the defense of contributory negli-

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[9] *Empire State-Idaho M. & D. Co.* v. *Hanley*, 205 U. S. 225, 236 (1907); *Souffront* v. *LaCompagnie des Sucreries de Porto Rico*, 217 U. S. 475, 487 (1910)—involving the very same question of an alleged "usurpation" by the court "of the province of the jury"; *Pleasants* v. *Fant*, 22 Wall. 116 (1874).

[10] To the same effect are petitioners' cited *Herron* and *Capital Traction Co.* cases (Pet., p. 16); *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 657 (1935).

gence "shall, at all times, be left to the jury" (p. 92). The Court held:

> "In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law" (p. 95).[11]

Finally, petitioners are barred from this constitutional contention for the reason that they never raised it in either court below.[12]

POINT II

Petitioners' underlying contention, that the defense of qualified privilege should have been submitted to the jury, was also academic and meaningless because (a) the jury found malice, which destroyed the privilege in any event, and (b) the court did submit to the jury the identical defense of provocation, with identical consequences.

(a)

It is conceded (Pet., p. 9 *et seq.*), and elementary law, that in a libel action a qualified "privilege is lost when [defendants] defame with malice" (*Andrews* v. *Gardiner*, 224 N. Y. 440, 448 [1918, Cardozo, J.]). In the instant case, "the jury in awarding punitive damages necessarily

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[11] And, even if "the common law of England as it existed in 1791" (Pet., p. 8) had not been the same, see *Galloway* v. *U. S.*, 319 U. S. 372, 390-1 (1943): "The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791. * * * Nor were 'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system."

[12] *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50 (1902); *Helvering* v. *Minnesota Tea Company*, 296 U. S. 378, 380 (1935).

found that the defamatory charges were inspired by malevolence and ill-will" (Applts.' App., fol. 594). Consequently, petitioners' entire contention that the question whether they had exceeded their privilege should have been submitted to the jury is academic, since the jury actually determined that question.

This is clear, not only as a matter of simple logic, but of decision. In *Blake* v. *Trainer,* 148 F. 2d 10 (C. A., D. C., 1945), one of the grounds of appeal was "that the court refused an instruction that the defendant had a qualified privilege in making" the publication. The court unanimously held that:

> "• • • if there was any error in refusing the instruction it is cured by the fact that the jury gave a verdict for punitive damages based on an instruction which properly defined express malice. Such malice as the jury must have found here would destroy the qualified privilege of the defendant if any existed" (p. 12).

The court cited as controlling the decision of this Court in *Kanawha & M. R. Co.* v. *Kerse,* 239 U. S. 576, 582 (1916), which holds:

> "• • • the refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based. • • •
>
> "A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced."[13]

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[13] To the same effect: *Fidelity & Deposit Co.* v. *Courtney,* 186 U. S. 342, 351, 359 (1902); *Nevada State Journal Pub. Co.* v. *Henderson,* 294 Fed. 60, 62 (C. A. 9, 1924), cert. den. 264 U. S. 591 (1924).

(b)

Petitioners actually never excepted to the trial court's dismissal of the defense of privilege, but acquiesced therein.[14] They merely sought reassurance that the court was not dismissing their other defense of fair comment, under which the jury would accord substantially the same consideration to the circumstances surrounding their publication. The jury considered that defense and rejected it.

Moreover, petitioners were also permitted at the end of the trial to amend their answer, so as to retain their identical defense of reply, *in haec verba,* with only the label changed, to one of partial defense of provocation.[15] The issue under this amended defense, which *was* submitted to the jury, was identical, and the jury, by awarding substantial punitive damages, obviously rejected the claim of provocation. Even less would the jury have countenanced the stricter defense of reply.

Petitioners frivolously assert (*e. g.*, p. 14) that the trial court improperly relieved plaintiff of the burden of proof of malice. The record is directly to the contrary, since the trial court charged the jury that "the burden * * * of showing malice * * * is on the plaintiff," to be proven "by a fair preponderance of the evidence."[16]

The principle that this Court will not review questions which are academic or abstract, is pecularily applicable here.

It is therefore clear that, not only is it academic which law applies to the allocation of functions between court and jury, but the entire question of such allocation is moot. It is well established that this Court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or

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[14] Appendix to Appellants' Brief below, fols. 427-9.

[15] Appendix to Appellee's Brief below, fols. 91-5.

[16] Appendix to Appellants' Brief below, fols. 479, 503.

rules of law which cannot affect the result." (*California* v. *San Pablo*, 149 U. S. 308, 314 [1893]; *Rice* v. *Sioux City Cemetery*, 99 L. Ed. 507, 511 [1955, Frankfurter, J.]).

A fortiori, the questions conjured up by this petition do not "fall * * * within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals" (*Ex parte Woods*, 143 U. S. 202, 206 [1892]—where the questions were of far greater substance).

POINT III

Directly contrary to Petitioners' Point II, the court below expressly and correctly followed the New York law on the propriety of an award of punitive damages, even though (a) only nominal compensatory damages are found, and (b) defendants claim reply or provocation. Petitioners are also precluded by their failure to except to the pertinent instructions to the jury.

(a) In affirming the awards of punitive damages [17], the court below expressly followed "New York law" (Pet., p. A-8). It also approved the "standards" applied in the District Court's opinion, which cites the New York decisions (*ibid.*; Applts.' App., fols. 575-86). In addition, it had recently cited and followed those New York cases in *Stevenson* v. *Hearst Consolidated Publications, Inc.*, 214 F. 2d 902 (1954), cert. den. 348 U. S. 874 (1954), where it held that under "the law of New York * * * punitive damages might be recovered in a case in which only nominal

[17] Petitioners (pp. 3-4, 17) incorrectly state that punitive damages of $175,000 were awarded in the instant case and allocated among the defendants; actually, the jury rendered three separate awards against the three defendants, in the sums of $100,000, $50,000 and $25,000 (Applts.' Appendix, fols. 3-4, 86-7, 572-3, 600-1).

damages were found" (p. 911).[18] There are many additional New York appellate decisions fully concurring with the five cases cited in *Stevenson*, at 911.[19]

Finally, petitioners never excepted to the trial court's charge that the award of punitive damages "need have no relationship" to any compensatory damages (Applts.' App., fol. 587) and, under Rule 51, F. R. C. P., they are precluded from raising this contention. Indeed, in petitioners' own cited *Biggans* v. *Hajoca Corp.* (Pet., p. 19), precisely the same contention regarding punitive damages was rejected because, *inter alia*, of appellant's failure to except to precisely the same charge.[20]

(b) Petitioners' next contention, "that a plaintiff who has provoked the libel * * * is not entitled to exemplary damages" (p. 18), ignores the fact that the jury, in rendering its verdict for large punitive damages, manifestly found that the plaintiff had *not* "provoked the libel". Furthermore, petitioners' statement that this question "was entirely overlooked and not answered below" (p. 17) is grossly inaccurate, since this contention was urged at great length in their brief below, with citation of all of their instant authorities (Pet., ftns. 18-20), and was fully answered by the respondent. That the mere existence of a qualified privilege does not bar punitive damages is shown by such decisions as *Kaminsky* (*supra*, ftn. 19).

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[18] In *Stevenson*, the court actually criticized the trial judge's charge in other respects (p. 908)—in contrast to its commendation of the instant charge and conduct of the trial (Pet., p. A-4).

[19] *Kaminsky* v. *American Newspapers, Inc.*, 258 App. Div. 1078 (2nd Dept.), affd. 283 N. Y. 748 (1940)—in which an instruction that punitive damages might be added to an award of six cents (Record on Appeal, fols. 1355-6) was upheld; *Hess* v. *News Syndicate Co. Inc.*, 267 App. Div. 886 (1st Dept., 1944)—upholding a verdict for six cents compensatory and $12,000 punitive damages; *Fry* v. *Bennett*, 9 Abb. Pr. 45, affd. 28 N. Y. 324 (1863); *Buteau* v. *Naegeli*, 124 Misc. 470, 472 (1925), reversed on other grounds, 216 App. Div. 833.

[20] 185 F. 2d 982, 986, affirming 94 F. Supp. 593.

Petitioners' authorities are, again, inapplicable. In *Kiff* (*id.*, pp. 17-18): (1) the action was not for libel at all, but for assault and battery; (2) plaintiff there was a trespasser, and it was expressly found that "all acts of the defendant • • • were directed to the removal of the aggressor" (p. 329)—facts totally absent here; (3) the court there expressly distinguished a situation where a defendant "under pretense of right" committed a "wanton and malicious" act (*ibid.*)—as did the instant defendants; and (4) the court acknowledged that its decision was not one of "general doctrine," and that on other facts punitive damages had frequently been allowed (p. 332).[21]

Here again, petitioners took no exception to any of the trial court's instructions defining the criteria for the award of punitive damages (App. Appendix, fol. 501 *et seq.*), and they are therefore again precluded (*supra*, p. 17).

POINT IV

Petitioners' Point III, that the court below should have applied "New York limits on punitive amounts," is frivolous because (a) New York standards were actually complied with, and (b) *Erie* v. *Tompkins* clearly does not supplant federal appellate procedure.

There is no actual conflict regarding the power of review among the courts of appeals in the various circuits.

(a)

Petitioners' premise, that the lower courts "stopped" after determining the correctness of the charge to the jury

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[21] In *Gressman* (Pet., pp. 17-18), judgment was actually rendered for plaintiff, and even the court's dictum, to which petitioners refer, was predicated upon the absence of "actual malice" (p. 480)—which, in the instant case, was abundant and uncontroverted (Pet., pp. A-8-9; Applts.' Appendix, fols. 591-603); in *Voltz* (Pet., p. 17) the court actually held that punitive damages might be awarded in all tort actions "as a punishment to the defendant and as a protection to society" (64 N. Y. at 444).

(p. 19), is in the teeth of both opinions below. The Court of Appeals, far from "disavowing" any power to examine the verdict, as petitioners contend (p. 19), affirmatively held that there was no "indication of passion or prejudice" (Pet., p. A-8). It also vigorously rejected petitioners' contention that "the evidence was insufficient to warrant the assessment of punitive damages," and held that it could not "find any abuse of discretion" by the trial court (*ibid.*).

The trial judge, in denying petitioners' motion to set aside the verdict for excessiveness, had "examined with scrupulous care"[22] the "limits upon the jury's power," and actually cited the New York decisions on his power to disturb a verdict (Applts.' Appendix, fols. 583-6). He too applied the test of whether the verdict was "the result of passion or prejudice," which is precisely the criterion established by New York law (*ibid.*).

Since the decisions below are entirely consonant with the state law, petitioners' *Biggans* citation (Pet., p. 19, *supra*), also referring to the law of the particular state there (Pennsylvania), obviously poses no conflict. Furthermore, the court in *Biggans* held:

> "The test is not what sum this court would have awarded were it the trier of the facts" (91 F. Supp. at 601).

Indeed, that statement is contained in the very same sentence as, and immediately precedes, the fragment quoted by petitioners (p. 19), which they have inaccurately set forth as an entire sentence.

(b)

If it is the purport of petitioners' obscure argument that *Erie* requires the application of New York standards for setting aside verdicts, their contention is academic. If they contend, further, that *Erie* installs New York appel-

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[22] See opinion of Court of Appeals herein (Pet., p. A-4).

late procedure and powers of review in the federal courts, their argument is ridiculous. This is clear from petitioners' own federal citations (Pet., ftn. 25), all of which expressly apply federal law in determining the powers of the federal appellate courts.

Furthermore, under petitioners' own cited *Gillen* case (p. 20) and many other decisions [23], "the quantum [of a verdict] is recognized as a question of fact" (*Gillen*, p. 151); "each case must stand on its particular facts" (*ibid.*). The Court of Appeals in *Gillen* therefore concluded that *Erie* has no application whatsoever.

Finally, there is no applicable "conflict on the notion of judicial power" between the courts in the various circuits (Pet., p. 19). The standards for review enunciated by the court below completely conform to the decisions in the other circuits.[24] Indeed, petitioners' own cited authori-

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[23] *State Farm Mutual Automobile Insurance Co.* v. *Doughty*, 149 F. 2d 812 (C. A. 5, 1945); *Employers Liability Assurance Corp.* v. *Madden*, 219 F. 2d 205 (C. A. 5, 1955); *Wright* v. *Paramount-Richards Theatres*, 198 F. 2d 303 (C. A. 5, 1952); *Reid* v. *Nelson*, 154 F. 2d 724 (C. A. 5, 1946), cert. den. 329 U. S. 716; *Texas-Pacific-Missouri-Pacific Terminal R.* v. *Welsh*, 179 F. 2d 880 (C. A. 5, 1950). In petitioners' *Covey Gas* citation (p. 19), the court actually refused to consider the application of *Erie*.

[24] *New York, N. H. & H. R. Co.* v. *Zermani*, 200 F. 2d 240, 245-6 (C. A. 1, 1952), cert. den. 345 U. S. 917; *Scott* v. *Baltimore & O. R. Co.*, 151 F. 2d 61, 65-6 (C. A. 3, 1945); *Chicago, Rock Island & Pacific Ry. Co.* v. *Kifer*, 216 F. 2d 753, 756-7 (C. A. 10, 1954), cert. den. 348 U. S. 917; *Coca Cola Bottling Works* v. *Hunter*, 219 F. 2d 765, 766 (C. A., D. C., 1955); *Larsen* v. *Chicago & N. W. R. Co.*, 171 F. 2d 841, 845, (C. A. 7, 1948); *Fort Worth & Denver Ry. Co.* v. *Thompson*, 216 F. 2d 790, 793 (C. A. 5, 1954); *Railway Express Agency* v. *Cox*, 179 F. 2d 593, 596-7 (C. A. 5, 1950); *Behrman* v. *Sims*, 157 F. 2d 862, 864 (C. A., D. C., 1946); *Atlantic Coast Line R. Co.* v. *Burkett*, 192 F. 2d 941, 945 (C. A. 5, 1951); *Capella* v. *Zurich General Acc. Liability Ins. Co.*, 194 F. 2d 558, 559 (C. A. 5, 1952); *Capital Transportation Co.* v. *Compton*, 187 F. 2d 844, 848-9 (C. A. 8, 1951); *McCoy* v. *Cate*, 117 F. 2d 194 (C. A. 1, 1941).

ties (ftn. 25) fully support the decision herein.[25] Thus, it was held in the cited case of *Bucher* v. *Kraus* (*ibid.*), that "exemplary or punitive damages • • • are, of necessity, peculiarly within the discretion of the jury and of the court presiding at the trial" (200 F. 2d, at 587).

Conclusion

The petition fails to present any genuine question whatever. The "conflicts" which it conjures up are chimerical. The authorities which it cites affirmatively support the decision below. The petition is singularly devoid of merit, and should be denied.

Dated, August 18, 1955.

Respectfully submitted,

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[25] In *Fairmount Glass Works*, 287 U. S. 474, this Court unequivocally upheld the refusal of federal courts of appeals to review for excessiveness (p. 485); all of petitioners' other authorities limit the power of review to errors of law or patent abuse of discretion—which have been expressly negatived by the court below. Petitioners' entire argument is a mere recapitulation of the *Stevenson* petition (*supra*).

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IN THE

Supreme Court of the United States

October Term, A. D. 1955

No. 262

WESTBROOK PEGLER, THE HEARST CORPORATION and HEARST CONSOLIDATED PUBLICATIONS, INC.,

Petitioners,

v.

QUENTIN REYNOLDS,

Respondent.

REPLY BRIEF

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Supreme Court of the United States

October Term, 1955

No. 262

WESTBROOK PEGLER, THE HEARST CORPORATION and HEARST CONSOLIDATED PUBLICATIONS, INC.,

Petitioners,

against

QUENTIN REYNOLDS,

Respondent.

REPLY BRIEF

Read at face value the respondent's brief seemingly has answered the petition. However, a closer analysis reveals that brief to be an unreliable guide to the law. The authorities cited by respondent do not rule the question to be decided here.

For example, *Tuson* v. *Evans* is cited as English law by respondent (resp. br. p. 9). We agree that it stands for the proposition claimed by the respondent namely, that it is the Judge's function to decide whether the use of the occasion was excessive.

However, respondent failed to mention that the *Tuson* case was *expressly* overruled in *Cooke* v. *Wildes,* 5 El. & Bl. 328, 341-3, 119 Eng. Rep. 504 [Q. B. 1855].

Similarly, we agree that Seelman's book "*The Law of Libel and Slander in the State of New York*" is correctly quoted (resp. br. p. 5) to the effect that a court should declare manifestly irrelevant words in a reply to be unprivileged. But respondent again singularly fails to indicate that Seelman states this as his personal "Rule Sug-

gested for Such Cases"; and just prior to this personal suggestion he reports that the English and New York law is to the contrary. Seelman states "that the rule, that privilege is lost if the need of the occasion is exceeded, was overruled in England; and that the question of excess bears only on the question of malice" (p. 263).

The respondent uses other disingenuous devices as bootstraps. He cites as the pertinent English common law at 1791, cases which were tried without a jury, a case from Scotland in 1897 which administers procedure unknown to the common law and other inapplicable cases from New Zealand, South Africa, Ireland and Michigan. (See resp. br. p. 9 n. 7.) He also unwittingly cites in this group, cases in which the question of excess was specifically left to the jury and was not decided as a matter of law, *e. g., Senior* v. *Medland, Fryer* v. *Kinnersley* (resp. br. p. 9 n. 7). Likewise, respondent miscites as authority on our question, cases which were rulings on the legal character of the occasion rather than cases which deal with the use of the occasion, *e. g., Ahern*; *Godson*; and *Warren*; *Merchants Ins. Co.*; *Norfolk & Washington S.*; (n. 7), *Washington Times Co.*; and *Blake* (n. 4), *Russell* v. *Washington Post* (p. 7) and a case not involving the right to a jury trial at all, at common law, *Galloway* v. *U. S.* (n. 11).

A further example of unreliable documentation is the bald misstatement that *Dickson* v. *The Earl of Wilton* was overruled by a later case (resp. br. p. 10, n. 8). Petitioners cite this case as the common law of England which was not here vindicated (pet. pp. 8-9, n. 4). *Dickson* was not overruled on the question at bar. A dispute of law did arise as to a collateral point of evidence not here important. Moreover, the *Dickson* case was explicitly followed in *White* v. *Nicholls*, by this Court, on the rule of evidence as decided by the *Dickson* case. Furthermore, *White* v. *Nicholls* vindicated the right of a defendant to a jury determination of the justifiability of seeming excessive use of the occasion for a privileged reply.

These and like devices permeate and destroy the usefulness of the respondent's brief. We must conclude that the brief was written on a fatuous notion that neither this Court nor opposing counsel would examine or analyze respondent's documentation.

We note one further aspect of respondent's brief. We rely in our quest for review on the notion that whether the respondent be one, Pegler, or whether the article be libelous, constitutional rights and the law of the land must be vindicated. The inflammatory tone and melodramatic content of Reynolds' brief proceeds on contrary assumption and implication (pp. 2-3). Plainly, also, Reynolds is eager to overlook the fact that he initiated the controversy by his provocative attack on Pegler and that the jury did not exonerate Reynolds on the counterclaim for this attack.

Despite respondent's obfuscation, misciting of cases, and sophistry, the fact remains that the reasons why the Supreme Court should grant certiorari, as set forth in petitioner's application, are unimpaired and even strengthened.

The fact remains, as conceded by the Court below, that the Courts of Appeals are sharply divided on the meaning, interpretation and thrust of the Seventh Amendment and its relationship to *Erie* v. *Tompkins*.

The fact remains that petitioners were denied their constitutional right to a jury trial of a fact historically reserved to the jury for determination.

The fact remains that the District Court departed abruptly from accepted common law judicial procedures and the Court of Appeals sanctioned such abrupt departure.

Respondent has sedulously avoided meeting the issues posed by the opinions below which should be determined by this Court.

Thus the issue of the Seventh Amendment is this: When at common law the use made of a privileged occasion was reserved to the jury for determination, may a federal court in 1955 refuse to permit the jury to determine the same, and treat this question of fact historically for the jury as one of law for the court?

Respondent's cases and argument with the exception of *Tuson* v. *Evans,* discussed *supra,* are principally directed to the question of whether the judge or the jury determines the existence of the occasion of privilege. We agree that that is usually a question of law—but that question has been decided by both courts below in favor of petitioner. That is not the question on which certiorari is sought. Respondent's belated oblique challenge to the existence of the occasion is without merit since, in any event, that would only raise a conflict in the evidence which must be decided by the jury. *Lovell* v. *Houghton,* at p. 525 of 116 N. Y. 520 (1889); *Adam* v. *Ward,* at p. 318 of [1917] A. C. 309.

I.

Use made of the occasion, not whether there was an occasion privileging a reply, bottoms the question presented.

The petition (p. 6) carefully shows and we quote:

"1. The Judge determines whether there is an occasion of privilege.

2. The jury determines whether the claimed libel is within the privilege or in excess of what the occasion requires—(*i. e.*) the non-existence or existence of malice in fact."

Respondent's "Point I" announcing his view that it is not for the jury to determine whether a publication exceeds the scope of a privileged reply is bottomed on the errone-

ous argument that the question posed "intrinsically, is one of the construction of a writing, which is peculiarly for the Court" (resp. br. p. 5).

Respondent erroneously says that petitioners have ignored "the leading case of *Guenther* v. *Ridgway*, 187 App. Div. 593 (1st Dept. 1919)". The case was not ignored. It was properly evaluated by the petitioners as a case ruling that the legal character of the occasion is determined by the Judge. It is not a case which passes on the use of a privileged occasion. Thus:

Guenther v. *Ridgway* (resp. br. p. 5) as shown by its record on appeal dealt with a libelous article written by one Rice *before* the publication of the article to which it purported to reply. Other articles by the plaintiff in that case had been published some seven or more months before the Rice reply but Rice did not even purport to be using those antecedent and remote articles as a basis for an occasion of privilege to reply—he did not seek to defend himself therefrom. The Court's ruling illumines the context in which its other statements must be taken, viz., "In this article Rice did not attempt to defend himself from the charges made against him" etc. (p. 596).

Reliance by respondent on the other New York cases cited under his Point I is misplaced (resp. br. p. 6); they plainly show on examination that the question decided was the legal character of the occasion rather than the use to which the privilege had been put. Thus the bold title (resp. br. p. 4) that the "New York decisions unequivocally uphold the dismissal of defense" is not borne out by respondent's documentation.

The respondent's brief next takes up federal cases (br. p. 7). Again his reliance is misplaced since the cited cases decide that the Judge determines the legal character of the occasion and do not say whether or not it is for the

jury to decide what use of that occasion has been made, *i. e.*, how the privilege has been exercised. In dealing with the federal cases the respondent falters completely when he comes to *White* v. *Nicholls*, 44 U. S. 266, 290-2 (1845), in which this Court fully vindicated the rule for which the petitioners contend.

Thus, the bold title under Point I that "The federal decisions are in complete accord" with the dismissal (resp. br. p. 7) is likewise unsupported by the documentation thereof.

Finally, the bold title in respondent's brief that "The English common law, which petitioners invoke, is also completely adverse to them" (resp. br. p. 8) is splintered completely by painstaking scrutiny of the few English cases referred to and of the non-English cases indiscriminately lumped under this head.

One further English authority may be cited to show that the function which must be accorded to the jury in such cases existed and persisted over a very long period and is not of novel character. In *Nevill* v. *Fine Arts and Gen. Ins. Co.*, L. R. [1895] 2 Q. B. 156 at 169; aff'd [1897] A. C. 68, Lord Esher, M. R., said:

> "For a very long time past judges have over and over again directed juries that the defense that the occasion was privileged can only be rebutted by shewing that the defendant in using the privileged occasion has used it with actual malice, or 'express' malice as it has been some times called."

Semantic confusion seemingly accounts for the error below. The term "excess of privilege" has been indiscriminately utilized by some courts to refer to the lack of any privilege and also to refer to misuse of an existing privilege. The former category calls for a ruling by the judge. The latter category invokes the historical jury function.

An example of the former category is a libel directed not at the attacker who has privileged the defender to reply but at some third party outsider. Some courts have used the language of excess of privilege to describe such a libel on an outsider.

The following quotation from *Nevill* v. *Fine Arts and General Insurance Company* [1895] 2 Q. B. 156 at p. 170; [1897] A. C. 68, makes perfectly clear this distinction in the use of semantics and the entirely different distribution of function as between court and jury in the two cases:

> "where a defendant on an occasion which is privileged as between him and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion. But when there is only an excessive statement having reference to the priviliged occasion and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice. In none of the cases on the subject, so far as I know, has it been held that the privilege is taken away when there has been such an excessive statement, unless the jury has found that there was malice."

The House of Lords in *Adam* v. *Ward, cit. supra,* at p. 324 referred to *Warren* v. *Warren* (relied on by respondent, p. 9, n. 7) as a good illustration of the former category.

Further illustrations of the former category relied on by respondent are *Guenther* v. *Ridgway* (resp. br. p. 5); and *Merchants Ins. Co.* v. *Buckner* (resp. br. p. 4).

In *Guenther* one Keys attacked Rice. As between Keys and Rice there was a privileged occasion, but in the purported reply Rice libeled the plaintiff instead, and thus as between them there was no privileged occasion.

In *Merchants* the defendant had a privilege as between it and the board, but the defendant attacked a third party—the plaintiff Buckner.

In privilege cases, where there is no extrinsic evidence of express malice, the Court will examine the privileged communication for relevancy, pertinency, intemperateness, and the like, in order to determine if there is any intrinsic evidence of express malice for the jury, for if there be none the judge must direct a verdict for the defendant. See *e.g.*, *Laughton* v. *Bishop of Sodor and Man*, L. R. [1872] 4 P. C. App. 495.

It is precisely this type of situation to which Gatley, *Libel and Slander*, Odger's, *Libel and Slander*, and 20 Halsbury's *Laws of England* (relied on by respondent, br. pp. 8, 9), refer.

Similarly, in *Beatson* v. *Skene*, [1861] 5 H. & N. 838, 157 Eng. Rep. 1415 (Ex. 1860) the Judge left it to the jury to say whether the alleged libel was relevant to the occasion and this action was questioned. On appeal by the plaintiff, Pollock, C. B., treated the question whether the relevancy of the communication was a matter for the jury or should have been determined by the Judge as a matter of law. The problem thus posed was the use made of a privileged occasion and the Court answered, that the matter was "properly left to the jury" (p. 855).

In sum, the Seventh Amendment to the Constitution embraces in the federal jurisprudence the common law rule that the issue is to be decided by a jury, that common law was expressed by this Court in *White* v. *Nicholls, cit. supra,* and the authority of *White* has not been dimmed by any later ruling of this Court.

II.

The jury did not cure the Judge's error.

Respondent as a second argument says that the invasion of the jury's function by the Judge's error in dismissing the defense of reply became academic because the jury verdict was for punitive damages. This is a futile point at bar. It depends necessarily on the erroneous notion that the jury decided that the use made of the privileged occasion was excessive and was attended by express malice and thus subject to assessment of punitive damages. The jury made no such decisions.

There is no implication at bar that the jury found express malice—intent to harm—on the part of any of the petitioners. The most that can be said is that implied or legal malice bottoms the verdict.

The jury was charged that it could find malice and levy punitive damages against petitioners if there was culpable *negligence* in the publication (Applt. App. below, fol. 502) and that provocation by Reynolds could only mitigate such damages (*ibid.*, fol. 515). The jury also received the case with the instruction that malice may be implied from falsity of a libel—*i. e.*, that *mala fides* on the part of petitioners may be presumed. Thus the jury verdict for punitive damages does not negative the existence of a proper use of a privileged occasion; it expresses merely that malice was implied here according to the instructions of the Judge.

The verdict would have significance only if the jury itself had been given to decide whether the use of the privileged occasion was justifiable, considered in the light of the rules of law applicable. From the simple error at bar invading a jury function by dismissal of the complete defense of reply, there flowed a complex of errors which

make it impossible to construe the resultant verdict as a negation of the privilege or as an expression of a finding of evil design and intent to harm, *i. e.*, actual malice.

At the threshold, the petitioners were entitled to but did not receive the presumption of *bona fides* of the exercise of their privilege.

The Judge erroneously charged the jury that the defendants' plea of justification with the resultant repetition of the alleged libel, was evidence of actual malice (Applt. App. below, fols. 506-7).

A plea of justification with the resultant repetition of the libel is never evidence of actual malice in a privilege case.[1]

The Judge having erroneously eliminated the privilege of reply, charged the jury that the alleged libel was presumptively false and that the burden of proving truth rested on the defendants (Applts. App. below, fols. 460-2). The burden of proving falsity is always on the plaintiff and never on the defendant in a privilege case,[2] making this aspect of the charge erroneous.

The Judge then again erroneously charged the jury that from this presumed falsity of the alleged libel, actual malice could be inferred (Applt. App. below, fol. 504). The law of New York is squarely to the contrary when a privileged occasion is involved. In a case of privilege, actual malice may not be shown by proof of falsity of the alleged

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[1] *Klinck* v. *Colby*, 46 N. Y. 427-439 (1871); *Decker* v. *Gaylord*, 35 Hun (N. Y.) 584, 585 (5th Dept. 1885); Seelman, *The Law of Libel and Slander in the State of New York*, sec. 278, p. 271; sec. 35, p. 648.

[2] *Parrott* v. *Smith*, 248 N. Y. 607 (1928), affirming charge of Hubbs, *J.*, to the jury that in a privilege case the burden of proving falsity is on the plaintiff; Seelman, *op. cit. supra*, sec. 274, p. 269.

libel; punitive damages in privilege cases can only be awarded on proof of evil design or intent to harm.[3]

The Judge instructed the jury that it could infer actual malice from the publication of the alleged libel itself (Applt. App. below, fol. 504). However, the alleged libel—the charge—is never proof of actual malice in a privilege case; such proof must be by extrinsic fact.[4]

The above specific errors and other errors permeated the Judge's charge because of the initial and erroneous dismissal of the privilege of reply.

Exceptions to the charge with respect to the above errors were unnecessary after the threshold error.[5] In fact, the dismissal of the defense of privilege of reply was duly excepted to (Applt. App. below, fol. 429). More pertinently, no exception was required. Rule 46 F. R. C. P.

Respondent's brief, typically, has quoted from *Andrews* v. *Gardiner* (resp. br. p. 12) without informing the Court of the context for the quotation that "the privilege is lost when (defendants) defame with malice." We concede that this was said. But it was said of a finding by a jury which

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[3] Seelman, *op. cit. supra*, sec. 273, p. 268. The clearest expression of the rule is found in *Marx* v. *Press Pub. Co.*, 134 N. Y. 561 (1892). In that case the Court of Appeals held that a charge that the jury would not be justified in awarding to the plaintiff exemplary damages "unless the article was found to be false and malicious *and* published with *intent to injure* the plaintiff" correctly stated the law (p. 563). (Emphasis supplied.) *Klinck* v. *Colby*, 46 N. Y. 427 (1871).

[4] *Hemmens* v. *Nelson*, 138 N. Y. 517 (1893); *Browne* v. *Pruden-Winslow Co.*, 195 App. Div. 419-422 (1st Dept. 1921); Seelman, *op. cit. supra*, sec. 35, p. 647.

[5] *Klinck* v. *Colby*, 46 N. Y. 427, 439 (1871). The situation is akin to that on a trial where by reason of a principal decision by the Court a continuing exception is allowed to a party. *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2 Cir. 1952), cert. den. 343 U. S. 966 (1952).

was given to decide the issue of malice in the context and under the presumptions of *bona fides* of the defendants in a privileged occasion. The defense of privilege with all its attendant and consequential rules and presumptions was submitted to and not withheld from the jury in the *Andrews* case.

Klinck v. *Colby*, 46 N. Y. 427 (1871), ruled, in like circumstances to these that the jury's verdict could not cure the Judge's error, and the New York Court of Appeals there struck down *Klinck's* contentions (respondent's precise contentions at bar) as follows (pp. 438-9):

> "But further than this. In an action for libel, where, under an answer proper to that end, the defendant has shown that the communication was privileged, his further answer of justification by the truth of the charge, though without proof given to sustain it, may not be taken into consideration as evidence of malice, and in aggravation of the damage. (*Wilson* v. *Robinson*, 7 Q. B. Ad. & Ellis, N. S., 68). The jury may not look for the actual malice which shall nullify the privilege, in the fact that the defendant has put upon the record a justification which he has not attempted to sustain. It is true, as before noticed, that the jury were told, that they might take this answer into consideration as evidence of malice; which instruction was not excepted to. But this instruction was given after it had been ruled by the court, that the alleged libel was not a privileged communication, which last ruling was excepted to. And that exception makes available, in behalf of the defendants, the rule above stated from *Wilson* v. *Robinson*. We conclude, then, that the learned justice erred at the trial in holding, that the communication was not a privileged one; and that his *holding upon the law was not afterwards remedied by any fact found by the jury.*" (Emphasis supplied.)

III.

Respondent's Points III and IV are sufficiently answered in petitioners' brief.

In these points the respondent suggests, *inter alia,* that cases decided by the New York Appellate Division, an intermediate court (*Kaminsky*), rule or override the decisions of the highest state court—the New York Court of Appeals authority on which the petition relies. The most important reason which respondent musters against the authority of *Kiff* v. *Youmans* on this point, decided by the New York Court of Appeals, is that the tort administered in that case was a physical, not a verbal assault. Such reasoning is futile.

The patent purpose of the argument under these two points is to confuse the fundamental failure by the courts below to vindicate basic rules of law on misconceptions which should be set straight by this Court.

The unparalleled result below, in disregard of constitutional rights and the regular course of judicial decision for such cases, warrants a review by this Court.

Dated: August 23, 1955.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioners.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 262

WESTBROOK PEGLER *et al.*,
Petitioners,

against

QUENTIN REYNOLDS,
Respondent.

RESPONDENT'S REBUTTAL BRIEF

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RESPONDENT'S REBUTTAL BRIEF

Petitioners' Reply Brief (pp. 1-2) in effect admits that the Respondent's Brief answers the petition—except for certain alleged instances of "unreliable documentation," which are confined primarily to footnotes. Even those charges of inaccuracy are utterly unfounded.

Tuson v. *Evans* (one of thirteen authorities cited in footnote 7, Resp. Br.), which admittedly (Reply Br., p. 1) supports respondent's point, was clearly *not* overruled on that point by *Cooke* v. *Wildes* (*ibid.*). Petitioners have disregarded the language of *Cooke* immediately preceding that to which they refer, in which the court pointed out:

> "The whole letter certainly refers to the subject of printing the register; and no irrelevant calumny is introduced into it * * *" (5 El. and Bl. at 340).

In complete contrast therewith, the instant charges against the respondent consisted exclusively of "irrelevant calumny."

That respondent's concededly pertinent quotation from *Seelman* is not merely that writer's "suggestion" (Reply

Br., pp. 1-2), is clear from Section 592 of his work, entitled "Province of Court." This is to precisely the same effect and cites numerous supporting decisions, including *Guenther* v. *Ridgway* (Resp. Br., pp. 5-6; *vide infra*).

That the English law was never "overruled" and fully supports respondent's Point I, is demonstrated by *Gatley, Halsbury,* and the numerous English cases cited by respondent, as well as petitioners' own cited *Huntley* v. *Ward* (Resp. Br., pp. 8-10).[1] Furthermore on petitioners' own premise that "the English common law in 1791" is the criterion, it is the earlier rather than the later English decisions which are important.

The "case from Scotland" referred to in the Reply Brief (p. 2) was in accord with the substantive common law of England, and is cited in *Gatley's* treatise on the English law (p. 272). More significant, however, is petitioners' comment that that jurisdiction administers a different "procedure" from England's (*ibid.*). Such difference is surely no greater than the difference between the procedure in the federal courts today and that of England in 1791, yet it is upon the latter that petitioners have premised their entire sophistry.[2]

The *Senior* case (Reply Br., p. 2) holds clearly that: "The question of privilege is entirely for the judge" (p. 1040). In *Fryer* (*ibid.*), directly contrary to petitioners' assertion, the question of excess was decided as a matter of law. Indeed, the jury there had actually negatived malice, but nevertheless the court held, as a matter of law, that the communication was "in excess of the occasion" (quoted in full, Resp. Br., n. 7).

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[1] In the most recent decision, *Rhodes University College* v. *Field* (1947) 3 S. A. L. R. 437, following the House of Lords' *Adam* v. *Ward,* it was clearly held, as a matter of law, that the communication "exceeds the limits of the privilege [of reply] because it is unrelated to the purpose for which the occasion exists" (p. 464).

[2] In addition, the "cases from New Zealand, South Africa and Ireland" (Reply Br., p. 2) cited by respondent, all applied the English common law in support of respondent's position, and the "Michigan" decision comprehensively collates the English authorities.

That the other decisions, the citation of which petitioners criticize, were not "rulings on the legal character of the occasion" (Reply Br., *ibid.*), but involved the scope of a *concededly* privileged occasion, appears, for example, from the language of *Ahern,* following *Warren* (both referred to, *ibid.*). *Ahern* held that *Warren* was "directly in point," since defendant's letter there:

> "might be confidential and privileged, [but] such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt" ([1840] Arm. Mac. and Ogle. at 44).

Similarly, in *Godson* (Reply Br., p. 2), the court held, in precise support of the judgment here:

> "I cannot say, that I left it to the jury, whether this was a confidential [privileged] communication; I thought it exceeded the line of confidential communication" (129 Eng. Rep. at 626).

In all of the other, federal cases referred to (Reply Br., *ibid.*), the occasion was also clearly one of privilege, but the court held, as matter of law, that the language of the publication exceeded the privilege (Resp. Br., pp. 7-8). *Galloway* v. *U. S.* (*ibid.*) adds the very pertinent principle that, even if the question had been one for the jury under "the common law in 1791," the Seventh Amendment "did not bind the federal courts" thereto (319 U. S. at 390). Since, as was there reiterated (p. 389), the Seventh Amendment does not "deprive the federal courts of power to direct a verdict for insufficiency of evidence," *a fortiori* does it not prevent the dismissal of one of several defenses (particularly when, by amendment, even that defense was retained, with a mere change of label—Resp. Br., p. 14).

Petitioners' *Dickson* citation (Reply Br., p. 2) is not only entirely inapplicable (see Resp. Br., p. 10), but its overruling by higher court decisions deprived it of all authority. For example, *Dawkins* (*ibid.*) held that that

case was "a mere *nisi prius* decision * * * inconsistent with the great mass of authorities" (28 L. T. at 141, affirmed H. L.).

Significantly, petitioners avoid any mention of *McQuire* v. *Western Morning News Co.* (Resp. Br., n. 7), where the court stressed the requirement that a publication, "in order to be within the protection of the privilege * * * had to be relevant; otherwise it was never within it, and the judge could hold as a matter of law that privilege did not extend to it [citations]" (p. 112).

Not only are the petitioners' charges of inaccuracy therefore wholly unfounded, but they are particularly irresponsible since not a single one of their authorities is apposite (Resp. Br., *e. g.* pp. 5-10), and since they have grossly distorted the opinion below, respondent's authorities, and the charge to the jury (*id., e. g.* at 5, 15-18; *infra,* II.).

I.

The authorities uniformly hold that the scope and relevancy of a privileged reply, as well as the existence of a privileged occasion, are to be determined by the court.

Petitioners have completely misrepresented Point I of Respondent's Brief. All of the authorities therein cited—New York, Federal and English, as well as petitioners' own cases (Resp. Br., *e. g.* pp. 5-6, 8, 9-10)—clearly hold that scope or relevancy, and not merely the existence of a privileged occasion, is a question of law for the court. As was, for example, succinctly stated in *Sickles* v. *Kling,* 60 App. Div. 515, 520, expressly following the New York Court of Appeals' leading decision on qualified privilege, *Hamilton* v. *Eno,* 81 N. Y. 116:

> "* * * whoever decides the question of privilege must perforce decide whether the language used was

> within or without the limit of it. To hold that the jury must do this is to substitute the jury for the court."

The Reply Brief (p. 4) concedes that: "1. The Judge determines whether there is an occasion of privilege." It then, however, in "2." attempts precisely the same obfuscation as was criticized by the court below (Pet., p. A-6), confusing excess of scope of privilege with "malice" (Resp. Br., p. 5).

Petitioners' purported distinction of *Guenther* v. *Ridgway* (Reply Br., pp. 5, 7-8) is grossly inaccurate. The opinion there expressly states that the libelous article was "published in the course of a newspaper warfare which had been commenced by the plaintiff" (p. 595), and that "the replying party [the defendant] has exceeded his privilege" (p. 596). Consequently, it decided, "there was no question upon this issue to be left to the jury" (p. 596).

As shown in Respondent's Brief (n. 5), *White* v. *Nicholls* (Reply Br., pp. 6, 8) has not the slightest application. Indeed, that case refutes point "II" of the Reply Brief, by holding that "proof of express malice * * * will render [a privileged] publication * * * actionable" and, further, that a finding of malice may be based "upon the face of the reply or publication itself" (pp. 291-2; *vide infra*, p. 8).

In quoting from *Nevill* v. *Fine Arts and Gen. Ins. Co.*, the Reply Brief (pp. 6-7) omits the only relevant statements. Lopes, L. J. there wrote (p. 171):

> "There is, in my opinion, nothing in the circular which is wholly extraneous and has no relation to the privileged occasion; so that the cases which have been put, where something wholly foreign to the privileged occasion is contained in a statement, are not in point."

Similarly, Lord Esher, whom petitioners incompletely quote, clearly acknowledged the distinction:

> "There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it" (p. 170).

Gatley (pp. 279-280), citing *Adam* v. *Ward* (Resp. Br., p. 10), gives the *Nevill* decision precisely the same interpretation. The extreme dissimilarity of the *Nevill* publication from the instant column is emphasized by the statements in the affirming opinion there that that publication was "no libel at all" ([1897] A. C. at 72), that it was "true" (p. 74), and that there was not "the smallest ground for a jury to find that this was malicious" (p. 75).

In attempting to distinguish *Merchants Insurance Co.* v. *Buckner,* the Reply Brief (pp. 7-8) overlooks the express statement that "the controversy with Buckner & Co. [the plaintiff] led up to the correspondence" involved, and that defendant "also had correspondence and litigation with Buckner & Co." (98 Fed. at 232)—so that there was clearly a privileged occasion vis-a-vis the plaintiff.

Laughton (Reply Br., *ibid.*) actually confirms the power of the court as opposed to that of the jury. Indeed, the same court as that which decided *Laughton* held, in two later decisions, that lack of relevancy destroyed the privilege as matter of law (*Murphy* v. *Halpin,* [1874] Ir. R. 8 C. L. 127, 134; *Nevin* v. *Roddy* [1935] Ir. R. 397, 421).

Finally, *Beatson* v. *Skene* (Reply Br., p. 8), from which petitioners have excerpted part of a sentence (*ibid.*), has not the slightest application. The publication there was held by the court to be manifestly relevant, virtually "as a matter of law," since "the defendant had been directed" by a superior officer to supply the information contained in it to an Army colonel (p. 855). In the instant case the exact opposite is true: the column was patently irrelevant, on its face and as a matter of law.

II.

Point II of the Reply Brief concedes that a finding by the jury of "actual malice" would have cured any alleged error in dismissing the defense of reply; such a finding was necessarily included in the jury's verdict for punitive damages totaling $175,000.

Petitioners do not, and cannot, dispute the obvious proposition that the finding of malice destroyed any privilege of reply in any event, and therefore rendered the propriety of the dismissal of the defense entirely academic (Resp. Br., pp. 12-13). They counter merely with the extraordinary contention that the verdict for punitive damages, totaling $175,000, did not import actual malice. This absurdity is premised upon egregious distortions of the charge to the jury.

The trial judge *explicitly instructed the jury that punitive damages may be awarded only "where it is established that a defendant was inspired by actual malice"* (Applts' Appendix, fols. 501-2, 478). His instruction that: "Actual malice encompasses the notion of ill-will, spite, hatred," or "a wanton and reckless indifference, or culpable negligence with regard to the rights of others" (fol. 502), also not excepted to, is supported by all of the authorities, state and federal.[3]

Nowhere did that judge charge, as petitioners contend (Reply Br., pp. 9-10), "that malice may be implied from falsity" or, even less, from the "presumed falsity" of the

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[3] For example, *Smith* v. *Matthews*, 152 N. Y. 152; *Warner* v. *Press Publishing Co.*, 132 N. Y. 181; *Holmes* v. *Jones*, 121 N. Y. 461, and cases cited; *Holmes* v. *Jones*, 147 N. Y. 59; *Corrigan* v. *Bobbs-Merrill Co.*, 228 N. Y. 58, 67; *Press Publishing Co.* v. *McDonald*, 63 Fed. 238 (C. A. 2); *Morning Journal Association* v. *Rutherford*, 51 Fed. 513 (C. A. 2).

libel. The instruction which petitioners have distorted, was that the jury "may consider * * * the very nature of the false and defamatory matter in conjunction with all the other evidence and the circumstances under which the article was written and published" (fol. 504)—an instruction eminently correct and proper.

Applicable hereto *a fortiori* are *petitioners' own cited* cases of *White* v. *Nicholls,* 44 U. S. 266, 292, *supra,* upon which they so strongly rely (Reply Br., pp. 6, 8; *vide supra,* p. 5), and *Collier* v. *Postum Cereal Co.,* 150 App. Div. 169 (Pet., p. 8 n.), as well as many other decisions.[4] Thus, in *Collier,* it was held: "* * * of course the language of a retort may be so intemperate or violent as to be of itself evidence of malice" (p. 178). Similarly, *McKee* (n. 4, *infra*):

> "Appellant urges that no malice was shown. The whole publication reeks with malice * * *"

Since the foregoing were all "privilege cases," they completely demolish petitioners' argument (Reply Br., p. 11) that actual malice in a privilege case may not be evidenced by the language of the libel itself—an argument which in any event is irrelevant, in view of the above quoted charge invoking "all the other evidence and circumstances." Petitioners' other authorities (ns. 3 and 4) are all inapplicable, as none of them remotely held that violent or scurrilous language is not evidence of malice in a privilege case.

Furthermore, *White* v. *Nicholls, supra,* also held that: "Falsehood and the absence of probable cause will amount to proof of malice" (p. 291). In the instant case, the petitioners admitted not only absence of probable cause, but actual knowledge of the falsity of many of their charges (Resp. Br., p. 3). Finally, petitioners' entire contention

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[4] *McKee* v. *Robert,* 197 App. Div. 842, 847; *Carpenter* v. *N. Y. Evening Journal Publishing Co.,* 111 App. Div. 266, 269.

is rendered trebly academic by the fact that the record is peculiarly replete with what the Reply Brief (p. 11) terms "extrinsic" evidence of malice, in the highest degree (*e. g.* Applts.' Appendix, fols. 595-8; Appellee's Appendix, fols. 19-83).

The trial judge defined, most lucidly and comprehensively (Pet., p. A-4) and without the slightest exception by petitioners, all of the elements of malice, as a prerequisite to an award of punitive damages (Applts.' Appendix, fols. 501-14, 518-25). Far from charging that malice "may be presumed" (Reply Br., pp. 9-10), he emphasized that: "The burden of proof to establish the fact of actual malice is upon Reynolds, and this burden he must bear by a fair preponderance of the evidence" (Applts.' Appendix, fol. 503).

Petitioners' citation of *Klinck* v. *Colby,* regarding a "plea of justification" (Reply Br., pp. 10-12), is entirely inapposite for no less than four independent reasons: (1) The answer here far transcended a mere plea of justification, since it "not only repeated but elaborated upon the matters set forth in the original defamatory publication; even the tone and characteristics of the pleading are reminiscent of the style of the column in suit * * *" (Opinion below, Pet., p. A-9, now reported 223 F. 2d 429, 434); (2) The proof of malice in the instant case was manifestly not limited to the answer interposed, but was demonstrated by every bit of evidence and was, indeed, "not seriously disputed" (*supra,* pp. 8-9; Applts.' Appendix, fol. 591); (3) The trial court expressly instructed the jury that "only, if from all the circumstances, you find actual malice in the filing of the answer, may you take it into account in the assessment of punitive damages" (Applts.' Appendix, fols. 506-7); and (4) The New York Court of Appeals, in its later decision of *Cruikshank* v. *Gordon,* 118 N. Y. 178, 184-5, limited even the inapplicable language quoted from *Klinck,* and held that a mere plea of justification could be considered as evidence of malice.

Finally, petitioners' excuse for not having excepted to any of the court's instructions on malice, on the ground that they had objected to the dismissal of the defense of reply (in which they are also in error—Resp. Br., p. 14), is untenable. As hereinabove shown, all of the instructions on malice were independent of the existence of privilege, so that petitioners were required, under Rule 51 F. R. C. P., to except to those instructions in order to avail themselves of any alleged error therein (Resp. Br., p. 16).

III.

Point III of the Reply Brief defaults under Respondent's Points III and IV.

Points III and IV of Respondent's Brief are, under all of the authorities, unanswerable. There was not the slightest "failure to vindicate" (Reply Br., p. 13) any rule of law whatsoever.

The "result below" was eminently correct and just, and its review by this Court is unmerited under every criterion.

Respectfully submitted,

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